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HAROLD B. WILLEY, C

No. 774 62

IN THE

Supreme Court of the United States

October Term, 1954

RAY WHITAKER and HARRY L. SWAIM, doing business as Blue Motor Coach Lines, *Appellants,*

v.

LOUISVILLE TRANSIT COMPANY, the CITY OF LOUISVILLE, and the DEPARTMENT OF MOTOR TRANSPORTATION, COMMONWEALTH OF KENTUCKY, *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

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May 6, 1955.

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INDEX

	Page
Opinions and Mandate Below	2
Jurisdiction	2
Statutes Involved	3
Questions Presented	3
Statement of the Case	4
The Facts	4
The Proceedings Below	5
The Scope of This Appeal	6
The Federal Questions Were Raised	7
The Questions are Substantial	8
The Decision Below Undermines Fundamentally the Status of the Certificate of Convenience and Necessity	9
The Decision Below Creates a No-Man's-Land for Utility Services for Our Rapidly Growing Suburbs	10
The Cancellation of Appellants' Certificate Impairs the Obligation of Contract	15
The Cancellation of Appellants' Certificate Deprives Them of Property Without Due Process of Law	16
The Kentucky Statutes Under Which Appellants Secured and Exercised Their Operating Rights Created Contractual and Property Rights	18
Conclusion	20
Appendix A: Opinions and Mandate Below	A- 1
Final Order of the Department of Motor Transportation	A- 1
Order and Judgment of the Franklin Circuit Court	A-12
Opinion of the Court of Appeals	A-15
Mandate of the Court of Appeals	A-22

Page

Appendix B: Statutes Involved A-23

Constitution of the Commonwealth of Kentucky.... A-23

Kentucky Revised Statutes (1954):
Chapter 81: City Classification, Boundaries and Annexation A-24

Kentucky Revised Statutes (1950):
Chapter 281: Motor Carriers A-26

CITATIONS

CASES:

Cincinnati N.O. & T.P. Ry. Co. v. City of Lexington, 86 F. Supp. 913 (E.D. Ky. 1949) 16
City of Decatur v. Thames Bank & Trust Co., 84 F. (2d) 105 (C.C.A. 5th 1936) 16
City of Wichita Falls v. Bowen, 143 Tex. 45, 182 S.W. (2d) 695 (1944) 14
City Railway Co. v. Citizens' Street Railroad Co., 166 U.S. 557 (1897) 15
Cuyahoga River Power Co. v. Akron, 240 U.S. 462 (1916) 16
Dahnke-Walker Milling Co. v. Boudurant, 257 U.S. 282 (1921) 3
Dartmouth College case, 14 U.S. 518 (1819) 15
Detroit United Railway v. Michigan, 242 U.S. 238 (1916) 15
Frost v. Corporation Commission, 278 U.S. 515 (1929) 16
Graham v. Folson, 200 U.S. 248 (1906) 15
Houston & Texas Central Ry. Co. v. Texas, 170 U.S. 243 (1898) 15
Howard v. Commissioners, 344 U.S. 624 (1953) 5
Jones v. United States, 9 F. Supp. 973 (D. Colo. 1951), affd. 194 F. (2d) 783 (C.C.A. 10th 1952).... 17
King Manufacturing Co. v. Augusta, 277 U.S. 100 (1928) 3
Los Angeles v. Los Angeles Gas & Electric Co., 251 U.S. 32 (1919) 16
Louisville v. Cumberland Tel. & Tel. Co., 224 U.S. 649 (1912) 16
Mt. Pleasant v. Beckwith, 100 U.S. 514 (1880)..... 15

Page

Northern Ohio T. & L. Co. v. Ohio, 245 U.S. 481 (1918) 15
Owensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58 (1913) 16
Reo Bus Lines v. Southern Bus Lines, 209 Ky. 40, 272 S.W. 18 (1925) 19
Richardson v. National Acceptance Co., 179 F. (2d) 1, cert. denied, 339 U.S. 981 (1950) 17
Shapleigh v. San Angelo, 167 U.S. 646 (1897) 15
Stanley v. Public Utilities Commission, 295 U.S. 76 (1935) 17
Southwestern Gas & Electric Co. v. City of Gilmer, 123 F. Supp. 11 (E.D. Texas 1954) 14
Town of Fultonsdale v. Clelland Bus Lines, 254 Ala. 225, 48 So. (2d) 21 (1950) 14
United States v. Rock Island Motor Trans. Co., 340 U.S. 419 (1951) 12, 17
United States v. Seatrain Lines, 329 U.S. 424 (1947) 17
United States v. Texas & Pacific Motor Transport Co., 340 U.S. 450 (1951) 17

CONSTITUTIONS AND STATUTES:

United States Constitution
Article I, Section 10 ..... 4, 15
Fourteenth Amendment 4, 16

Alabama Constitution (1901) § 220 14

Kentucky Constitution (1891):
Section 3 (text given in Appendix, p. 23) 3, 10
Section 163 (text given in Appendix, p. 23) 3
Section 164 (text given in Appendix, p. 23) 3

Carroll's Kentucky Statutes (1935):
Section 2739j-71 ..... 12, 18
Section 2739j-72 18
Section 2739j-89 18

Kentucky Acts (1893), c. 244, §§ 254-257 ..... A-24

Kentucky Acts (1932) c. 104, Art. 4, § 3 12

Kentucky Acts (1950) c. 63 ..... 12, A-26

Kentucky Acts (1954) c. 188, §§ 1, 6 ..... A-26

Kentucky Revised Statutes (1949):
Section 281.110(2) 19
Sections 281.120, 281.130 18

Page

Kentucky Revised Statutes (1950):
Sections 281.010(13), 281.635(1)-(3), 281.635(6)-(8), 281.665 (text given in Appendix, p. 26) 3, 5

Kentucky Revised Statutes (1954):
Section 81.010(1) A-24
Sections 81.100, 81.110 (text given in Appendix, p. 24) 3
Section 96.030 10
Section 136.120 19
Section 281.630(7) 12, 19
Sections 281.630(8), (9) 19
Section 281.650 18
Section 281.670 18
Section 281.780 2
Section 281.785(4) 2

OTHER:

Beck and Bogue, Motor Carrier Unifications (1941), 50 Yale L. J. 1376 17
Case (1954) 38 Minn. L. Rev. 170 14
Case (1950) 50 Columbia L. Rev. 1139 17
Comment, Extending Corporate Limits (1955) 26 Miss. L. J. 174 14
Hackworth, Digest of International Law (1940) 1:539-567 16
Mendelson, Suggestions for the Improvement of Municipal Annexation Law (1954) 8 Vanderbilt L. Rev. 1 14
Moore, International Law Digest (1906) 1:334-429.. 16
Municipal Annexations and Detachments: April 2, 1950-April 1, 1951 (U. S. Dept. of Commerce, Bureau of the Census, Geographic Reports, Series GEO. No. 3, Revised July 1, 1954 13
Towe, Incorporation, Annexation and Detachment of Ohio Municipalities (1955) 6 Western Reserve L. Rev. 146 14
U. S. Census of Population (1950) xii, xxxiii 12

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ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Court of Appeals of Kentucky, entered on January 10, 1955, affirming a judgment of the Franklin Circuit Court of Kentucky entered on October 2, 1953. The latter judgment affirmed in part and reversed in part a final order of the Department of Motor Transportation of the State of Kentucky entered on March 2, 1952. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS AND MANDATE BELOW

The Opinion of the Court of Appeals of Kentucky is reported in 274 S.W. (2d) 391. The Franklin Circuit Court issued an unreported "Order and Judgment," which constituted its opinion. The Department of Motor Transportation of the State of Kentucky issued an unreported "Final Order" which constituted its opinion. Copies of these opinions and orders, and of the mandate of the Court of Appeals, are attached hereto as Appendix A.

JURISDICTION

The case at bar originated in a consolidated administrative proceeding before the Kentucky Department of Motor Transportation to resolve the conflicting claims asserted in petitions filed, respectively, by appellants, and by Louisville Transit Co.,[1] each asserting the right to operate a passenger motor bus service between downtown Louisville and the "Camp Taylor area," the former claiming under a certificate of convenience and necessity issued by the State, and the latter under a City franchise. A final order of the Department holding that both might operate was appealed, pursuant to KRS § 281.780, to the Franklin Circuit Court of Kentucky, which held against appellants' right to operate, and for that of Louisville Transit. This judgment was affirmed on appeal to the Court of Appeals of Kentucky, pursuant to KRS § 281.785 (4).

The judgment of the Court of Appeals was announced on June 25, 1954 (R. 486). A petition for rehearing, after briefs and argument thereon, was

[1] In the earlier stages of this case, appellee Louisville Transit Co. was known as Louisville Railway Co.

denied on December 17, 1954, by an order which modified the earlier text of the Court's opinion (R. 490). The opinion was further modified on January 10, 1955 (R. 494), and the mandate of the Court was issued on January 11, 1955 (R. 504). Notice of Appeal to this Court was filed in the Court of Appeals of Kentucky on March 16, 1955 (R. 505-507).

Jurisdiction is conferred on the Supreme Court to review this decision by direct appeal by Title 28, United States Code, Sections 1257(2) and 2101(c).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921); *King Manufacturing Co.* v. *Augusta,* 277 U.S. 100 (1928).

STATUTES INVOLVED

The statutory provisions here involved, Kentucky Constitution, Sections 3, 163 and 164, and Kentucky Revised Statutes, Sections 81.100, 81.110, 281.010(13), 281.635(1)-281.635(3), 281.635(6)-281.635(8) and 281.665 are set forth in Appendix B hereto.

QUESTIONS PRESENTED

The Court of Appeals of Kentucky has construed the provisions of the Kentucky Constitution, Sections 3, 163 and 164, and the provisions of Kentucky Revised Statutes, Section 81.100, et seq., and Chapter 281, particularly the provisions of Sections 281.010 (13), 281.635 and 281.665, to require that the holders of a certificate of convenience and necessity duly issued for the operation of a passenger motor bus service, and used for upward of fifteen years in full compliance with the statutes and regulations applicable thereto, be summarily deprived of their operating

rights in favor of a competing carrier who holds a franchise from the City of Louisville, granted after the appellants' certificate was issued, upon the enlargement of the boundaries of the City of Louisville by the annexation of adjacent territory, so that the route in question had become an intracity route. The questions presented are:

1. Whether such provisions of the Kentucky Constitution and Statutes, as so construed and applied, impair the obligation of the contracts consisting of the certificate of convenience and necessity granted to the appellants in 1935, and of renewals thereof, in contravention of Article I, Section 10, of the Federal Constitution.

2. Whether such provisions of the Kentucky Constitution and Statutes, as so construed and applied, deprive appellants of their property without due process of law, in contravention of the Fourteenth Amendment to the Federal Constitution; to wit, their right to operate a passenger motor bus service established in accordance with and in reliance upon a certificate of convenience and necessity granted in 1935 and continuously in effect since then, and the tangible and intangible property used in rendering such service.

STATEMENT OF THE CASE

The Facts

The appellants, Ray Whitaker and Harry L. Swaim, partners, doing business under the name of "Blue Motor Coach Lines," have been operating, since 1935, a passenger motor bus service from a terminal in the central part of the City of Louisville, Kentucky, to an area known as Camp Taylor, then a suburb of

Louisville. In that year, a certificate of convenience and necessity was issued to them pursuant to Kentucky statutory provisions, upon their acquisition of the route by purchase from predecessor operators (R. 322-23). This certificate has been periodically and routinely renewed since that time, and no question was raised with respect thereto until the controversy now before the Court arose.

The suburban portion of this bus route runs through territory which the City of Louisville annexed by Ordinance effective June 30, 1950 (R. 467-469), pursuant to provision made by statute for such annexations.[2]

Louisville Transit Company had been operating local transit lines throughout the city prior to the 1950 annexation, under a 20-year franchise secured from the city in 1941. By its express terms, the franchise was not exclusive (R. 465, p. 13). On January 28, 1951, Louisville Transit, relying upon its city-wide franchise, extended one of its bus routes into the Camp Taylor area, thereby substantially duplicating the appellants' established route. The City acquiesced in this extension (R. 466).

The Proceedings Below

Appellants, on February 6 and 8, 1951, filed petitions with the state Department of Motor Transportation challenging the right of Louisville Transit to extend its route to the Camp Taylor area, and appealing, pursuant to KRS § 281.635(3), from the City's

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[2] The statutory provisions are set forth in the Appendix, pp. 24-25, infra. An earlier territorial annexation by the City of Louisville, under the same statutory authority, gave rise to a case recently decided by this Court, *Howard* v. *Commissioners*, 344 U.S. 624 (1953), involving unrelated issues.

acquiescence therein (R. 164-172). Louisville Transit's responsive pleading challenged appellants' right to continue to operate over their established route, on the ground that the territorial annexation had made the route intracity, and that appellants, never having operated intracity prior to the enactment of the new Motor Carrier Act in 1950, could claim no "grandfather" rights (R. 175-177, 179-187). These responsive pleadings were treated by the administrative agency as a separate proceeding for affirmative relief. The Department refused the relief sought by both carriers and ruled that both were entitled to serve the Camp Taylor area (Appendix, pp. 1-11, infra).

On separate appeals by appellants (R. 3-42), Louisville Transit (R. 129-155) and the City of Louisville (R. 100-115), the Franklin Circuit Court held for Louisville Transit on all points in a brief order upholding Louisville Transit's right to operate over the Camp Taylor route, and ordering the cancellation of appellants' certificate (Appendix, pp. 12-14, infra). The Court of Appeals affirmed, with opinion, one judge dissenting (Appendix, pp. 15-22, infra).

The Scope of This Appeal

Appellants do not here challenge so much of the decision below as permits Louisville Transit to continue to serve the Camp Taylor area. While they urged in the Kentucky courts that Louisville Transit should not be permitted, under Kentucky law, to invade their territory, they make no claim here that the decision of the Kentucky courts in this respect raises any Federal question. Appellants claim no constitutional right to a monopoly position.

This appeal is based solely upon so much of the judgment below as deprives appellants of the right

to continue operating over the route they have served since 1935, without any question as to their continued full compliance with the statutes and rules applicable to such operation. They submit that the monopoly of this service granted to Louisville Transit by the judgment below operates to deprive them of rights granted to them by the Constitution of the United States.

The relief appellants seek here is a re-instatement of the order of the Department of Motor Transportation.

The Federal Questions Were Raised

The administrative proceeding was considered at issue, and was set down for hearing, immediately after the filing of responsive pleadings which first challenged appellants' right to operate (R. 194). Thus, appellants' first opportunity to reply to Louisville Transit's plea for affirmative relief came at the administrative hearing, where counsel asserted constitutional protection for appellants' operating certificate (R. 305-306). This claim was discussed and upheld by the Examiner (R. 208). In Exceptions to the Examiner's Report, appellants again asserted the inviolability of their operating rights (R. 221, 230-231). The Final Order of the Commissioner referred to the constitutional claim, and upheld the right of appellants to continue to operate (R. 280; Appendix, pp. 10-11, infra).

These constitutional claims were re-iterated in the Franklin Circuit Court[3] and in the Court of Appeals

[3] Separate appeals were taken to the Franklin Circuit Court by appellants (R. 3-42), by Louisville Transit (R. 129-155) and by the City (R. 100-115), the latter two challenging the appellants' right to operate. Appellants responded with motions to dismiss, demurrers and general denials (R. 116-118, 156-158), which raised the constitutional questions. The Attorney General of Kentucky,

of Kentucky[4], as appropriate under the procedures followed in those courts. The opinion of the Court of Appeals referred to appellants' claims of contract and property rights protected against impairment by the Federal Constitution (Appendix pp. 19-20, infra) and concluded with the explicit statement:

> "The contention that rights guaranteed to Blue Motor by the Federal Constitution have been violated has been considered and found not to be sustainable." (Appendix p. 22, infra.)

THE QUESTIONS ARE SUBSTANTIAL

Two men who purchased the operating rights for a bus line in 1935, and who have conducted the service since then in full compliance with the applicable statutes and regulations, would be forced to discontinue this service, for no fault of their own, under the Kentucky court's decision. Louisville Transit, which bought operating rights for local transit service with-

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appearing in support of the administrative decision, filed similar pleadings (R. 70, 71, 159). With the issues thus joined, appellants argued the federal constitutional questions by brief submitted to the Circuit Court (pp. 4-6, 14-15, 36-40, 50-56, 60), and by oral argument. The Circuit Court rendered a short "Order and Judgment" without opinion (R. 95-97, 124-126, 161-163, Appendix, pp. 12-14, infra).

[4] Appeals to the Court of Appeals were taken by leave of the Franklin Circuit Court (R. 97, 126, 163). No assignments of error or analogous specification of the grounds for review were filed initially (R. 477-486). Appellants reiterated their constitutional claims in their brief (pp. 9, 18-19, 37-42, 52-61), in their reply brief (pp. 30-48), and in argument. The opinion of the Court of Appeals, as first issued on June 25, 1954, cited appellants' constitutional contention (R. 489-A, Appendix, p. 6) and rejected it. Appellants again asserted their claims under the impairment of contract and due process clauses of the Federal Constitution in their Petition for Rehearing and Brief (R. 489-A, Petition and Brief, pp. 7-12, 52-55, 68-69).

in Louisville six years after appellants secured their certificate would be given the windfall of additional exclusive territory, under the judgment below.

Appellants submit that this result not only deprives them of constitutional rights, but raises important questions of national significance as to the nature of the rights granted carriers and other public utility enterprises under certificates of convenience and necessity, particularly in the very busy field of municipal territorial annexation.

The Decision Below Undermines Fundamentally the Status of the Certificate of Convenience and Necessity

Public utility regulation, federal and state, has largely been cast in the mold of the certificates of convenience and necessity for the past 30 or 40 years. A matrix of transportation, communication, light and power, and a host of other services has developed throughout the nation under the legal structure provided by these certificates. Thousands of enterprises have invested billions of dollars in reliance upon the rights conferred by such certificates.

Statutes creating such certificates have universally defined the public policy under which the enterprises are to be regulated, made clear the retention of flexible regulatory authority in the administering governmental agencies, and defined, with varying degrees of precision, the scope, character and limitations of the authorized service. As a counterpart of these regulatory safeguards for the benefit of the consumer and the public, the certificate provides the utility at times with special privileges (easements over public highways, eminent domain, etc.) but, invariably, security of its operating privileges. Without exception, these statutes assure a certificate holder of retention

of his certificate (in some cases, an exclusive grant, in others, a non-exclusive one) except for his own misdeeds, which must be proved in the framework of procedural due process. It is inconceivable that the large capitalization typically required for utility service would have been forthcoming without some minimum security of tenure.

The Kentucky decision here under review destroys this minimum security. Appellants' tenure of 20 years would be abruptly cut off for no misdeed of their own. A bounty of additional territory would be handed to a competitor which never served it before, to be exploited on a monopolistic basis, when the competitor's only colorable claim stems from a franchise expressly non-exclusive, and which was required by Constitution and statute to be non-exclusive. Ky. Const. (1891) § 3; KRS (1954) § 96.030.

The Kentucky decision strikes at the fundamental status of the certificate. If the certificate assures the continuance of properly-used operating rights, the Kentucky decision is wrong. If the Kentucky decision is correct, no utility can be secure in its operating rights.

The Decision Below Creates a No-Man's-Land for Utility Services for Our Rapidly Growing Suburbs

The Kentucky Court concedes "for the purpose of this discussion" that the appellants' certificate "has some of the attributes of a property right" (Appendix p. 20, infra). Nevertheless, it ordered cancellation of the certificate on the ground that the existence of general statutory authority for municipal annexation of territory, coupled with the assignment of regulatory jurisdiction to municipalities, made the appellants' certificate defeasible upon annexation of the territory involved.

The argument proves too much. Of course, Kentucky can allocate regulatory authority between state and municipal agencies, as it can among state agencies. During the term of the certificate here in question, three different state agencies in succession have had regulatory jurisdiction over the appellants' bus service. Yet it was never suggested that a governmental re-organization destroys the established privileges of those being regulated. The fact that statutes are often amended can hardly be the basis for a claim that all rights acquired under a statute are defeasible if a later legislature chooses to amend the statute.

The Kentucky Court's reasoning cannot, of course, be limited to motor bus transportation. Thus, a gas company which laid its pipes in the Camp Taylor area many years before its annexation to Louisville in 1950, in perfect compliance with the State statutes then applicable, would now be compelled summarily to dig out its installations and clear the streets if the existing city gas company can exhibit a "city-wide" franchise. The annexation of a suburb might, depending on the franchise situation in the old city, require a general uprooting of gas, water, electricity, telephone and trolley car facilities, in deference to the priority of municipal franchises. Bus operators also must make substantial investments to provide service, and their investment is just as vulnerable to summary cancellation of operating rights. The record shows that the certificate in question in this case was "purchased" in 1935 (R. 322-23) in accordance with provision made for purchase under Kentucky law.[5]

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[5] ". . . No certificate or permit may be transferred without the consent of the Commission authorizing such transfer. Said Com-

The certificates held at the time of the administrative proceedings below were carried on the appellants' books at a value of $15,000 (R. 453). The investment of appellants in their bus operations is almost $200,000 (R. 453), much of which would obviously have only scrap value if their operating rights were taken away.[6]

The decision of the Kentucky Court, if permitted to stand, would seriously impair the provision of public utility services for the rapidly growing suburbs bordering our cities.[7] In 1935, and at any time until 1950, the appellants or any other utility company could have secured operating rights in the Camp Taylor area only from an agency of the State of Kentucky. No franchise could have been purchased from the City of Louisville by appellants for transportation or utility services in an area which was then

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mission is authorized to prescribe the conditions precedent to such transfer and to make any necessary rules and regulations pertaining thereto." Kentucky Acts (1932), c. 104, Art. 4, § 3; Carroll's Kentucky Statutes (1935) § 2739j-71. Substantially similar provision is made in the present statute, Kentucky Acts (1950), c. 63, § 13(7); KRS (1954) § 281.630(7). Similar purchases of certificates under federal regulation were involved in United States v. Rock Island Motor Trans. Co., 340 U.S. 419 (1951).

[6] The figures given include other bus routes operated by appellants (R. 284-85, 289-91), but the Camp Taylor route is their principal operation.

[7] The 1950 U.S. Census of Population showed a tremendous growth of population living in suburban areas. Thus, while the population of the United States as a whole increased 14.9% between 1940 and 1950 (page xii), the population of "the outlying parts of standard metropolitan areas" increased 35.5% (page xxxii). Even this figure does not give the full picture of suburban growth because the figures for central cities were based on their legal boundaries at the time of the two censuses, respectively. Thus, annexations to central cities between 1940 and 1950 were reflected in the 1950 Census as increases in the population of the central cities and reductions in that of the suburban areas ("outlying parts").

not a part of the City, however prophetic the appellants might have been as to subsequent annexation. The decision of the Kentucky Court of Appeals in the case at bar would also make the State agency, the only one which could have granted operating rights, powerless to provide the minimum guaranty which any enterprise would expect in making a substantial investment of this character: that it would be assured continued operating rights so long as it provided good service and complied with the laws.

The No Man's Land of regulation which would result if the decision of the Court below were permitted to stand would, we submit, seriously obstruct the development of public utility services for our growing suburbs, wherever State "home rule" legislation for municipalities is susceptible of the construction here given the Kentucky statutes. The annexation of suburbs by cities throughout the country is proceeding at a very rapid rate,[8] and giving rise to a variety of

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[8] A recent special survey by the Bureau of the Census entitled "Municipal Annexations and Detachments: April 2, 1950-April 1, 1951" indicates the frequency of municipal annexations. During that single year, 672 out of 7,291 incorporated places in the United States with a population of 1,000 or more carried out 1,569 annexations or detachments. (Throughout the report no breakdown is given between annexations and detachments, but it is stated that "the great majority were annexations".) The larger municipalities within this category showed even a greater rate of annexation. Thus, 22.4% of the places with population of 10,000 or more carried out an average of 3.4 annexations each during the single year. Of the places with population of 50,000 or more, 28.9% carried out an average of almost 5 annexations each. Geographic Reports (U.S. Dept. of Commerce, Bureau of the Census, July 1, 1954) Series GEO. No. 3 (Revised). In the detailed material contained in this report, the City of Louisville, Kentucky, is shown to have carried out only one annexation during the year, presumably the annexation of the Camp Taylor area involved in this appeal, which became effective July 1, 1950. By this annexation, Louisville added 9.9 square miles to its former area of 42.8 square miles.

legal problems.[9]

The precise question involved in the case at bar was before the highest court of Alabama in *Town of Fultonsdale* v. *Clelland Bus Lines,* 254 Ala. 225, 48 So. (2d) 21 (1950). Under a constitutional provision similar to that of Kentucky,[10] the Alabama court upheld the right of a passenger motor bus carrier to continue operating after the territory it served, previously unincorporated, became a town, despite lack of a permit from town officials. In *Southwestern Gas & Electric Co.* v. *City of Gilmer,* 123 F. Supp. 11 (E.D. Texas 1954), which turned on different issues, the utility which had served the territory newly incorporated into a municipality was again upheld in its right to continue its service. *City of Wichita Falls* v. *Bowen,* 143 Tex. 45, 182 S.W. (2d) 695 (1944), involved the rate of fare; the right to continue to serve the annexed territory was not even raised. No case has been found where the utility serving a suburb was ousted because of territorial annexation.

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[9] During the past six months, four discussions of legal problems involved in municipal annexation have appeared in as many law journals, Mendelson, Suggestions for the Improvement of Municipal Annexation Law (1954) 8 Vanderbilt L. Rev. 1; Towe, Incorporation, Annexation, and Detachment of Ohio Municipalities (1955) 6 Western Reserve L. Rev. 146; Comment, Extending Corporate Limits (1955) 26 Miss. L. J. 174; Case, (1954) 38 Minn. L. Rev. 170.

[10] Ala. Const. (1901) § 220: "No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys or public places of any city, town, or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village." Cf. Ky. Const. (1891) § 163, Appendix, p. 23, infra.

The Cancellation of Appellants' Certificate Impairs the Obligation of Contract

It is firmly established in the decisions of this Court that the grant of operating rights to a public utility constitutes a contract, protected from impairment by Article I, Section 10, of the Federal Constitution under the *Dartmouth College case,* 14 U.S. 518 (1819). The case of *Detroit United Railway* v. *Michigan,* 242 U.S. 238 (1916), is directly in point. There, a street railway company had been operating in the City of Detroit and in its suburbs. When the city boundaries were extended by annexation to include some of these suburbs, the city sought to subject the formerly suburban operations of the transit line to the regulations respecting rates of fare applicable within the old city boundaries. This Court held that the contractual rights of the transit company stemming from the franchises granted by the predecessor suburban communities were protected after annexation by the contract clause of the Constitution. Earlier decisions of the court, *City Railway Co.* v. *Citizens' Street Railroad Co.,* 166 U.S. 557 (1897) and *Houston & Texas Central Ry. Co.* v. *Texas,* 170 U.S. 243 (1898), and a later one, *Northern Ohio T. & L. Co.* v. *Ohio,* 245 U.S. 481 (1918), similarly upheld claims of utility companies under the contract clause.

In cases other than those involving franchises or certificates, this Court has also consistently held that changes of political boundaries of local governments cannot, under the Constitution, impair the contractual rights of those who dealt with the predecessor governmental authority. The successor local government is held liable for the obligations of its predecessor. *Mt. Pleasant* v. *Beckwith,* 100 U.S. 514 (1880); *Shapleigh* v. *San Angelo,* 167 U.S. 646 (1897); *Graham* v.

Folson, 200 U.S. 248 (1906); see also *City of Decatur* v. *Thames Bank & Trust Co.,* 84 F. (2d) 105 (C.C.A. 5th, 1936); *Cincinnati N. O. & T. P. Ry. Co.* v. *City of Lexington,* 86 F. Supp. 913 (E.D. Ky. 1949).

This doctrine has been equally accepted in the field of international law, where the liabilities of annexed territory are held to attach to the new sovereign. 1 Moore, International Law Digest (1906) 334-429; 1 Hackworth, Digest of International Law (1940) 539-567.

The Cancellation of Appellants' Certificate Deprives Them of Property Without Due Process of Law

Equally firmly established is the rule that public utility operating privileges, whether in the form of certificates of convenience and necessity or of franchises, are deemed vested property rights, protected by the due process clause of the 14th Amendment. *Frost* v. *Corporation Commission,* 278 U.S. 515 (1929), so held, the Court saying that a certificate of convenience and necessity issued by a state agency for the operation of a cotton gin "is not a mere license, but a franchise, granted by the state in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the 14th Amendment" (at 519-520). This decision followed a line of earlier cases which invoked the due process clause to protect utility franchises. *Louisville* v. *Cumberland Tel. & Tel. Co.,* 224 U.S. 649 (1912); *Owensboro* v. *Cumberland Tel. & Tel. Co.,* 230 U.S. 58 (1913); *Cuyahoga River Power Co.* v. *Akron,* 240 U.S. 462 (1916); *Los Angeles* v. *Los Angeles Gas & Electric Corp.,* 251 U.S. 32 (1919).

Recent litigation in this field has tended to turn on questions of statutory construction, rather than on

Constitutional issues, since regulatory statutes give thorough recognition to the vested rights of utility companies, whether through "grandfather clauses," see *Stanley* v. *Public Utilities Commission*, 295 U.S. 76 (1935), or through the protection of certificated rights against subsequent diminution, see *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947); cf. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951); *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U.S. 450 (1951).

The fundamental holding of the *Frost case*, that a certificate of convenience and necessity is protected under the contract and due process clauses of the Constitution, has stood unchallenged in this Court since its rendition.

The recognition of certificates as property rights finds support in other fields of law. Thus, federal income taxes are levied on capital gain resulting from the sale of an analogous certificate at a profit. *Jones* v. *United States*, 9 F. Supp. 973 (D. Colo. 1951), aff'd. 194 F. (2d) 783 (CCA 10th, 1952). Again, in mergers and consolidations of carriers and other public utilities, where the financial structure of the new corporation must be approved by Federal or State regulatory authorities, recognition has consistently been given to franchise or good will value, which is essentially the value of the certificate. Beck and Bogue, Motor Carrier Unifications, (1941) 50 Yale L. J. 1376, 1399, et seq. Certificates issued by the Interstate Commerce Commission may be validly mortgaged even though a transferee of the rights requires Commission approval to exercise them. *Richardson* v. *National Acceptance Co.*, 179 F. (2d) 1 (C.C.A. 7th 1950), cert. denied, 339 U.S. 981 (1950); see (1950) 50 Columbia L. Rev. 1139.

The Kentucky Statutes Under Which Appellants Secured and Exercised Their Operating Rights Created Contractual and Property Rights

The Kentucky Motor Carrier Act of 1932, under which the appellants' first certificate of convenience and necessity was issued in 1935 for the route here in question, provided:

> ". . . the Commission shall have no power to refuse to renew any existing permit or certificate, or any permit at any time granted by it, or to cancel any such permit or certificate whenever issued, except for just cause and after a hearing . . . "[11]

A right of appeal to the court was given to the holder "or owner" of a permit or certificate.[12] Similar provision has been retained in the Kentucky law through several major revisions of the motor carrier act.[13]

The statute in effect in 1935 permitted the sale of a certificate, with the permission of the regulatory agency.[14] The Motor Carrier Act of 1942 (which remained in effect until 1950) and under which appellants' certificate was regularly renewed, provided:

> Any certificate owned, held or obtained by any carrier may be sold, assigned, leased, bequeathed or transferred as other personal property upon

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[11] Carroll's Kentucky Statutes (1935 Ed.) § 2739j-72. See also ibid. § 2739j-89, which made provision for revocation, alteration or amendment of a certificate for violations of laws or rules and regulations.

[12] Ibid.

[13] See KRS (1949 Ed.) §§ 281.120, 281.130; KRS (1954 Ed.) §§ 281.650, 281.670.

[14] Carroll's Kentucky Statutes (1935 Ed.) § 2739j-71.

approval by the Division of Motor Transportation . . ."[15]

Substantially similar provision is retained in the statute now effective.[16]

The Kentucky Court of Appeals has quite explicitly held that the issuance of a certificate of convenience and necessity creates contractual and vested property rights in the grantee:

> "Such a grant or right is in the nature of a franchise, and though this is not exclusive it is a property right which may be protected from unlawful interference . . ." *Reo Bus Lines* v. *Southern Bus Lines,* 209 Ky. 40, 272 S.W. 18 (1925).

Kentucky has for many years levied a franchise tax on "franchises" of public service corporations, measured by their value,[17] which is applied to certificates of convenience and necessity, including the certificate here in question.

In all these ways, Kentucky held out to appellants a protected contractual and property status in the form of a certificate of convenience and necessity. In reliance upon these representations, appellants purchased a certificate and have operated a public service for 20 years, with a substantial investment. They seek here constitutional protection against the arbitrary destruction of these rights.

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[15] KRS (1949 Ed.) § 281.110(2).

[16] KRS (1954 Ed.) § 281.630(7). The current statute is even more specific in dealing with transfers of certificates resulting from corporate mergers and consolidations, ibid. § 281.630(8), (9).

[17] KRS (1954 Ed.) § 136.120.

CONCLUSION

It is submitted that the decision of the Court of Appeals of Kentucky construes Kentucky constitutional and statutory provisions in a manner inconsistent with the Federal Constitution. The decision has far-reaching implications for the development of utility services in our rapidly growing suburban areas, and raises serious questions about the whole structure of Federal and State regulation based on the certificate of convenience and necessity. We believe these far-reaching questions are of public importance, and are therefore substantial and merit plenary consideration by this Court for their resolution.

Respectfully submitted,

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May 6, 1955.

APPENDIX

APPENDIX A

Opinions and Mandate Below

BEFORE THE
DEPARTMENT OF MOTOR TRANSPORTATION
FRANKFORT, KENTUCKY

Docket No. 205

In the Matter of:

PETITION FOR REVIEW AND APPEAL BY BLUE MOTOR COACH LINES RELATIVE TO EXTENDED SERVICE AND NEW SCHEDULES BY LOUISVILLE RAILWAY CO.

Final Order

The Recommended Report and Order in this cause having been filed, and copies thereof having been served upon each of the parties participating in the hearing, and the exceptions and replies thereto having been duly served, filed and considered, and oral argument having been heard herein, and the Commissioner being fully advised;

IT IS HEREBY ORDERED that the Recommended Report and Order, as filed by J. Carl Rosskopf, Examiner, on the 14th day of June, 1951, be, and the same is hereby, approved only insofar as it agrees with this Final Order; and the appeal of Blue Motor Coach Lines, as filed on February 6, 1951, is hereby dismissed; and the petition for review and appeal, as filed by Blue Motor Coach Lines on February 8, 1951, is also hereby dismissed. The protest of the Louisville Transit Company to the issuance of the 1951 "restricted" city bus certificate to Blue Motor Coach Lines is also hereby dismissed.

On June 30, 1950, by Ordinance No. 179, Series 1950, the City of Louisville, hereinafter referred to as City, annexed a certain area commonly referred to as Camp Taylor. At the time of the passage of this ordinance, and prior thereto for a number of years, Blue Motor Coach Lines, hereinafter referred to as Blue Motor, in operating Common Carrier

Bus Certificates Nos. 46, 47, 48, 179 and 477, had operated into the City from various points outside of same; and in so doing had furnished bus service to the residents of the Camp Taylor area, such operation being fully in accordance with Blue Motor's operating authority as granted by the Department of Motor Transportation, hereinafter referred to as Department. It should be noted that the service rendered by Blue Motor was not an intra-city service as far as the City was concerned, its operating in the City being restricted to the picking up of passengers destined for points outside of the then existing corporate limits of the City and the discharging of passengers who had ridden into the City from points in the Camp Taylor area or from other points on inter-city routes served by Blue Motor.

The City, at the time of the passage of the above noted ordinance, was receiving city-wide bus service from the Louisville Transit Company, hereinafter referred to as Transit; and on January 28, 1951, Transit, with the approval of the Director of the Traffic Engineering Department of the City, extended its city-wide service to include the recently annexed Camp Taylor area. Thereafter, on February 6, 1951, Blue Motor, in accordance with K.R.S. 281.635(3), filed an appeal to the Department from the action of the City in granting Transit the right to operate in the Camp Taylor area. Also, on February 8, 1951, Blue Motor filed with the Department a petition for review and appeal of the action of the City in permitting Transit to operate in the Camp Taylor area and further requested that Transit be required to cease and desist its operation. On or about February 26, 1951, Blue Motor filed suit in the Franklin Circuit Court against Transit and others; but defendant's plea to the jurisdiction was sustained, and plaintiff took no appeal. Both the City and Transit immediately filed responses to the protest of Blue Motor, and Transit also protested the issuance by the Department of a 1951 restricted city bus certificate to Blue Motor. Following statutory notice, a hearing was held on April 30, 1951, J. Carl Rosskopf, Examiner, presiding. The learned Examiner's Recommended Report and Order was issued on June 14, 1951, his report recommending, in essence

that both Transit and Blue Motor be permitted to continue their operation in the Camp Taylor area. In accordance with statutory procedure, all parties excepted to the Recommended Report and Order and then replied to the exceptions. This was the status of the record and the facts as submitted to the Commissioner for the Final Order of the Department. Thereafter, on December 31, 1951, the Commissioner set the matter for oral argument on January 17, 1952, at which time all parties appeared, either in person or through their attorneys, and orally presented their cases.

As noted in the facts, this matter originally arose as an appeal by Blue Motor, under K.R.S. 281.635(3), from the action of the City in authorizing Transit to operate in the Camp Taylor area. However, upon an initial attempt to decide the matter, it readily becomes apparent that there is more than one issue involved and that this is indeed a most unusual and perplexing matter. To be specific, there is first the issue raised by Blue Motor's operation of a city bus service without possessing a franchise from the City authorizing same. Second, the issue of whether Transit had the right under its city franchise to extend its service into the annexed area; this also giving rise to the questions of whether the city bus certificate as previously issued Transit by the Department was automatically extended to include the annexed area, or whether Transit should have proved public convenience and necessity and the other factors required by K.R.S. 281.630(1) before it began its Camp Taylor operation. In addition, Transit has raised the question of the validity of certain restricted city bus certificates issued to Blue Motor by the Department, contending that Blue Motor was not entitled to be grandfathered into same.

Before attempting to make a determination of these issues it should be noted that it is fundamental that both Blue Motor and Transit are motor carriers, as defined by K.R.S. 281.010(12), and, as such, come within the jurisdiction of the Department and are required by K.R.S. 281.615 to obtain a certificate of public convenience and necessity from the Department before beginning any operation. Furthermore, as motor carriers they are subject

to the provisions of Chapter 281 of the Kentucky Revised Statutes, which was enacted in 1950 as Acts 1950, Chapter 63, and became effective June 15, 1950.

Since this matter was instituted by Blue Motor's appeal, let us first attempt to determine the validity of Transit's operation in the Camp Taylor area. It is necessary to note that prior to June 15, 1950, the effective date of the new Motor Carrier Act, Transit's city operation was regulated by the Public Service Commission of Kentucky, and Transit held no city certificate of public convenience and necessity from the Department. On December 29, 1950, several months after the effective date of the Act, Transit applied for a 1950 city bus certificate which was issued pursuant to K.R.S. 281.665(1). This certificate, in accordance with K.R.S. 281.665(1), was based on the grandfathering of Transit's operation as of December 31, 1949, and was renewed on January 1, 1951. Neither at the time of issuance of either of these city bus certificates, nor on December 31, 1949, was Transit rendering any type of bus service in the Camp Taylor area. Therefore when on January 28, 1951, Transit initiated service in the Camp Taylor area, such was the institution of an entirely new service—i.e., one which was not grandfathered. There is no question but that Transit's operation of a city bus service in the Camp Taylor area must be conducted pursuant to a certificate of public convenience and necessity as issued by the Department. The only such certificate possessed by Transit which could be construed applicable to the Camp Taylor operation was the 1951 city bus certificate. However, as previously pointed out, this certificate was one originally issued under a grandfathering statute based on operation as of December 31, 1949; and Transit has never applied to the Department to amend or extend this certificate to include and authorize operation in the newly annexed area. Thus arises the issue of whether or not a city bus certificate is automatically extended by annexation to permit operation in the annexed area or whether Transit should have proven the factors required by K.R.S. 281.630(1). The determination of these issues must lie in the Motor Carrier Act, and a study of it reveals several items of interest.

First, authority to operate as a city bus is defined as a city bus "certificate" and referred to a "regular route operation", see K.R.S. 281.010(13)(a). The Legislature, in using such terms as "certificate" and "regular route operation", thereby declared a city bus operation to be of a common carrier nature, rather than a contract carrier, see K.R.S. 281.010(4), K.R.S. 281.010(10) and K.R.S. 281.010(11). Secondly, if such operation is that of a common carrier, there are decisions too numerous and well recognized to be cited here supporting the established rule that a common carrier shall operate only over its authorized routes and, in order to amend its certificate to include additional routes, must prove public convenience and necessity over same. This was recognized by the Legislature in enacting K.R.S. 281.630(1), K.R.S. 281.630(6) and K.R.S. 281.700(1). However, it must be remembered that a city bus certificate, as defined by K.R.S. 281.010(13)(a) and as issued by the Department, authorizes service to all points within the corporate limits of the city, the routes over which such service is rendered being determined by the governing body of the city. K.R.S. 281.635(3) provides for an appeal to the Department from any action, finding or order of any such city. Thus, the Motor Carrier Act seemingly places a city bus operation in the common carrier category but permits certain laxity as regards the regular route aspect, in that the certificate of public convenience and necessity as issued by the Department authorizes city-wide operation over routes designated by the city from time to time as conditions warrant. The Department has never attempted to initially determine the routes in a city operated by the city bus, and no city bus operator has ever attempted to prove public convenience and necessity on any basis other than a city-wide one.

Transit has contended that the mere fact that the new area to be served lies within the corporate limits of a city is sufficient to indicate public convenience and necessity, and that since K.R.S. 281.635(3) gives a city primary regulatory power over city bus routes, a city bus certificate, as issued by the Department, is automatically extended by annexation to permit operation over the new city streets, regardless of the presence of other motor carriers in the

annexed area. To further support this, Transit cites a number of cases holding that upon annexation all roads passing through Camp Taylor became streets of the City. The Commissioner fully agrees with these cases but does not feel that they are in any manner decisive of this issue, since such a holding does not also decide in any degree the present issue of automatic extension of a city bus certificate.

Extension of its City franchise upon annexation is another contention which is made by Transit to support its operation in the annexed area. In this respect Transit cites *Truesdale* v. *City of Newport*, 28 KLR 840, 90 S.W. 589, in which case the Court of Appeals in 1906 held that a gas franchise in the City of Newport automatically extended to an area subsequently taken into the City. Although the Commissioner feels that the Truesdale case, supra, can easily be distinguished from the present case, in that there was no other gas company serving that area subsequently taken into the city, he does not think such is necessary; for regardless of whether the franchise automatically extends, the question remains as to the automatic extension of the city bus certificate, this certificate being just as necessary to a valid city bus operation as is the city franchise.

It should be noted at this point that the exercise by a city of its statutory power of annexation is in no wise similar to the determination of whether or not public convenience and necessity exist in an area. For example, it is entirely possible that a city may annex an area, a large proportion of which is sparsely settled and rural in nature and which would not be capable of sustaining any type of city bus service. In fact, the Department has previously had several instances in which city bus operators have not desired to render suburban bus service to areas adjacent to the city because there was not a need for bus service sufficient to sustain same. Should such an area be annexed, would it be reasonable to conclude that the existing city bus operation must serve it simply by virtue of the act of annexation? Furthermore, to cause extension of city bus service into an area in which public convenience and necessity does not exist and to require service in the area

simply because it has been annexed could have a disastrous effect upon the carrier's rate structure, in that the additional expense of operation would not be offset by increased revenue, and, therefore, rates would have to be increased to continue the fair return permitted by law. Of course not all annexed areas would be of this type, but such cases could arise. But as previously noted herein, K.R.S. 281.635(3) provides for an appeal to the Department from any order or finding of a city. Therefore, in the event that an area was annexed which was not conducive to economic bus service and the city called upon the existing city bus company to render such service, the carrier could appeal to the Department by virtue of the above noted statute. The final determination of the matter would vest in the Department and would be tantamount to a determination of public convenience and necessity, since the Department would have to find whether or not a need existed for the service over the routes which the city requested the carrier to serve.

The adoption of this theory of automatic extension of city bus service upon annexation would be entirely proper and in keeping with the present statutory law relative to this matter, but would it also solve the present issue involving the extension of city bus service into an area presently served by another carrier under certificates acquired prior to annexation? The Commissioner is of the opinion that automatic extension of a city bus certificate because of annexation is entirely proper under the present Motor Carrier Act and is required of the city bus operator, Transit in this case, unless under an appeal pursuant to K.R.S. 281.635(3) the Department rules otherwise; such automatic extension being proper and required regardless of whether or not a carrier, such as Blue Motor in this case, is presently rendering what amounts to city bus service in the newly annexed area. The reason for this conclusion arises from an aspect of this case which has not been previously mentioned—namely, the interest of the bus riding public as regards the furnishing of an integrated city-wide city bus service. Regulation of motor carriers has as its fundamental concept the interest of the bus riding public, and in any case involving a balancing of

interests between carriers, the Commissioner is of the opinion that this factor should be the decisive and controlling one. If in this case it should be decided that Transit could not serve the annexed area because of the presence therein of a former suburban carrier, Blue Motor, the ensuing result would be that the City would be served by two bus companies instead of one. This would result in many problems directly affecting the bus riding public. One of these would be the difficulty of maintaining adequate schedules upon the part of both carriers in order that bus riders would not be delayed in the resulting transfers necessary when one desired transportation from the annexed area served by one carrier to a point within the original corporate limits served by the other carrier. Additional problems concerning the honoring of the other carrier's transfers, the differences in rates due to variances in rate structure, etc., would not only adversely affect the public, but would also enlarge the administrative problems of both the City and the Department. Therefore, when considered in light of what is best for the interest of the bus riding public of the City, and particularly since the Motor Carrier Act permits same, the Commissioner finds that the 1951 City Bus Certificate as issued by the Department to Transit was automatically extended to permit legal operation of Transit in the annexed Camp Taylor area.

The question of extension of the City franchise is, in the opinion of the Commissioner, a matter which lies between the City which issued same and Transit. Seemingly, the City has approved extension of its franchise, since it approved Transit's operation in the Camp Taylor area. Furthermore, it is doubtful that this Department has jurisdiction in such a matter.

Attention must now be given to the present operation of Blue Motor within the annexed area. In so doing, there arises certain of the issues as previously noted herein. These are the contention of Transit as to the correctness of the issuance by the Department to Blue Motor of certain city bus certificates and the failure of Blue Motor to possess a franchise from the City. Before discussing the propriety of the city bus certificates, it should be clearly

brought out that such certificates, as issued, are restricted in that they do not permit operation throughout the entire City, but only provide for operation in the annexed area. Furthermore, a careful study of such restrictions will conclusively show that they permit no basic operation other than that validly engaged in by Blue Motor on June 15, 1950, said date being the effective date of the new Motor Carrier Act and also being prior to the date of annexation.

Careful consideration will also show that were it not for the occurrence of the passage of the new Motor Carrier Act and the annexation of the Camp Taylor area, Blue Motor, in order to lawfully operate in 1951, would have simply renewed its 1950 bus certificate. Thus, if no annexation had occurred, Blue Motor should have carefully analyzed its operation in light of the new Act in order to determine what was the new statutory designation of the bus operation it was conducting and applied in 1951 for the correct type of certificates. These certificates would have been issued without a hearing, since K.R.S. 281.665(2) provided for grandfathering of such authority. The Legislature realized in passing the new Motor Carrier Act that it was creating certain new and different designations for varying types of motor carrier authority and, therefore, in enacting K.R.S. 281.665(2), permitted the Department to change designations of previously granted operating authorities without a hearing. Therefore, Blue Motor, having possessed prior to June 15, 1950, (the date set forth in K.R.S. 281.665(2)) the authority to operate in the Camp Taylor area, would have applied for renewal of same, asking for a certificate bearing the new statutory designation which fitted the operation, such probably being a suburban bus certificate. However, when renewal time arrived Blue Motor was rendering an operation in an area which had been annexed into the City; and, therefore, the proper statutory designation was a city bus operation, restricted as was done herein. It should be noted that such annexation occurred after the effective date of the new Motor Carrier Act. It is contended by Transit that Blue Motor could not, by virtue of K.R.S. 281.665(2), be grandfathered into a city bus certificate, primarily due to the fact that on June 15, 1950, Blue Motor did not possess

authority to transport passengers for hire within the corporate limits of the City. This is true in one sense only, since Blue Motor did possess proper authority to operate in the Camp Taylor area which on June 15, 1950 was not part of the City.

As has been previously stated, Blue Motor was for a number of years picking up and discharging passengers along various routes in the Camp Taylor area, such operation being conducted in accordance with the various motor carrier laws and rules and regulations. Upon annexation Blue Motor has continued operating just as it did prior to same and has not attempted to increase or decrease the area served. All it attempted to do in so operating and in its renewed application was to seek to continue picking up and discharging passengers along the routes it served. In so doing, it was merely carrying out its duty to render service, a duty which the motor carrier law required it to assume when it initially proved public convenience and necessity and started serving the route or routes. The Department, in issuing the 1951 restricted city bus certificate to Blue Motor, did so upon the basis that Blue Motor had previously lawfully obtained the authority to render bus service in the Camp Taylor area, regardless of what statutory designation was given the operation by the new Motor Carrier Act. The Commissioner does not deem it necessary in this instance to determine the exact basis of Blue Motor's authority to so operate—i.e., whether it be a property right or mere privilege, etc., but would like to point out that even though it should be a mere privilege, it is a privilege which does not belong to all persons by common right, since to obtain it one must prove the factors required by K.R.S. 281.630(1) which include public convenience and necessity, that the applicant is fit, willing and able and that the existing transfer service is inadequate. Furthermore, it is in many cases a very valuable privilege when considered in light of its value in dollars and cents. To have refused to issue the present restricted city bus certificate to Blue Motor merely because of annexation would have been a complete extinguishing of Blue Motor's authority to serve the Camp Taylor area, and the Commissioner is of the opinion that the restricted city

bus certificate issued to Blue Motor was issued properly in accordance with the law.

The only remaining issue concerns the fact that Blue Motor is conducting a city bus operation within the corporate limits of the City without possessing a franchise in accordance with Section 163 and 164 of the Constitution of Kentucky. Although the Commissioner fully realizes that it is his duty and the duty of every member of the Department to uphold all of the provisions of the Constitution of Kentucky, he feels that due to the peculiar facts and circumstances of the present matter, in that Blue Motor has applied to the City for a franchise, but no action has been taken on such application, that the absence of a franchise in the present case is a matter which lies between the City and Blue Motor and is similar in theory to the previously discussed matter concerning the extension of Transit's city franchise. Therefore, the Commissioner does not rule upon this issue.

Therefore, the appeal of Blue Motor to the Department from the action of the City in granting Transit the right to operate in the Camp Taylor area, the petition for review and appeal from the action of the City in permitting Transit to operate in the Camp Taylor area and the protest of Transit to the issuance by the Department of a restricted city bus certificate to Blue Motor are each hereby dismissed in accordance with the findings and conclusions as set forth above.

UNDER MY HAND this, the 5th day of March, 1952.

/s/ JOHN M. KINNAIRD
John M. Kinnaird
Commissioner

FRANKLIN CIRCUIT COURT

Filed Oct. 2, 1953

KELLY C. SMITHER
Clerk Franklin Circuit Court

No. 44447

RAY WHITAKER AND HARRY L. SWAIM, d/b/a BLUE MOTOR COACH LINES, *Appellants*

v.

LOUISVILLE TRANSIT COMPANY, CITY OF LOUISVILLE, AND DEPARTMENT OF MOTOR TRANSPORTATION, *Appellees*

No. 44450

CITY OF LOUISVILLE, *Appellant*

v.

DEPARTMENT OF MOTOR TRANSPORTATION, JOHN M. KINNAIRD, Commissioner of Motor Transportation, RAY WHITAKER AND HARRY L. SWAIM, d/b/a BLUE MOTOR COACH LINES, AND LOUISVILLE TRANSIT CO., *Appellees*

No. 44451

LOUISVILLE TRANSIT COMPANY, *Appellant*

v.

DEPARTMENT OF MOTOR TRANSPORTATION, JOHN M. KINNAIRD, Commissioner of Motor Transportation, RAY WHITAKER AND HARRY L. SWAIM, d/b/a BLUE MOTOR COACH LINES, AND CITY OF LOUISVILLE, *Appellees*

Order and Judgment

The above styled appeals from the Department of Motor Transportation (hereinafter called the Department), having been consolidated and heard upon the record before the Department, filed in action No. 44447; the Department and Harry L. Swaim and Ray Whitaker, d/b/a Blue Motor Coach Lines (hereinafter called Blue Motor), each having

filed a motion to dismiss the appeal in actions Nos. 44450 and 44451; the Department and Blue Motor each having filed a general demurrer in actions Nos. 44450 and 44451; the Department having filed a general demurrer in action No. 44447 and Louisville Transit Co. (hereinafter called Transit), having filed a special demurrer in action No. 44447; answers having been filed in each of the consolidated actions; the special demurrer and the general demurrers having been passed to the merits; said actions having been submitted in open court for judgment upon briefs on the motions to dismiss and the merits; and the Court having considered the pleadings, the record herein, the briefs and argument of Counsel, it is hereby ordered and adjudged as follows:

1. Blue Motor's motion and the Department's motion to dismiss Transit's appeal in action No. 44451 is each overruled.

2. Blue Motor's motion and the Department's motion to dismiss Louisville's appeal in action No. 44450 is each overruled.

3. Blue Motor had no right to engage in intracity transportation of passengers for hire in the Camp Taylor area of Louisville, which area was annexed and became a part of Louisville on June 30, 1950. The Department erroneously issued to Blue Motor City Bus Certificate No. 800, which purported to authorize Blue Motor to engage in intracity transportation of passengers for hire in the said Camp Taylor area of Louisville. The Department erroneously held that Blue Motor was entitled to continue to hold such certificate and to engage in such transportation. A franchise from Louisville was, and is, a prerequisite under both the Kentucky Constitution and the Kentucky Statutes to engage in such intracity transportation. Blue Motor held no such franchise and said certificate was and is void and all operations thereunder were and are illegal.

WHEREFORE, it is ordered and adjudged:

(a) That said City Bus Certificate No. 800 and any renewal thereof be and the same is hereby set aside,

cancelled and held for naught and Blue Motor is ordered and directed immediately to surrender said certificate to the Department for cancellation and immediately to discontinue any and all intracity transportation of passengers for hire in Louisville over any of the routes specified in said City Bus Certificate No. 800.

(b) That Louisville Transit Co. recover of Blue Motor its costs expended in connection with action No. 44451.

(c) The City of Louisville recover of Blue Motor its costs in connection with action No. 44450.

4. The Department correctly held that Louisville Transit Co.'s franchise from Louisville and its City Bus Certificate No. 733 issued by the Department, automatically extend to the newly annexed Camp Taylor area of Louisville, and Transit was and is, by reason of such franchise and City Bus Certificate, authorized to engage in the intracity transportation of passengers for hire in said Camp Taylor area of Louisville which was annexed by and became a part of Louisville on June 30, 1950.

WHEREFORE, it is further adjudged that the Petition of Appeal filed by Blue Motor in action No. 44447 be, and same is hereby dismissed and Louisville Transit Co. and the City of Louisville are each entitled to recover from Blue Motor their costs expended in said action No. 44447. To all of which Blue Motor excepts and prays an appeal to the Court of Appeals, which is granted. The department excepts to paragraphs #1, #2, #3 of this judgment and prays an appeal to the Court of Appeals, which is granted.

Entered this 2d day of October 1953.

/s/ W. B. ARDERY
Judge

RAY WHITAKER et al., d/b/a Blue Motor Coach Lines, *Appellant,*

v.

LOUISVILLE TRANSIT COMPANY, the City of Louisville, and the Department of Motor Transportation, Commonwealth of Kentucky, *Appellees.*

Court of Appeals of Kentucky.

June 25, 1954.

As Modified on Denial of Rehearing Dec. 17, 1954.

Further Modification Jan. 10, 1955.

William A. Young, Harry McChesney, Jr., Robert H. Kinker, and Robert M. Pearce, Frankfort, for appellant.

John E. Tarrant, Earl S. Wilson, S. M. Russell, Alan N. Schneider, Louisville, J. J. Leary, Louis Cox, and George M. Catlett, Frankfort, for appellees.

COMBS, Justice.

The respective rights of Blue Motor Coach Lines and the Louisville Transit Company to maintain bus service in the Camp Taylor area of Louisville are in issue. The state Department of Motor Transportation held that both companies had the right to render such service. The circuit court held that the Louisville Transit Company had such right but that Blue Motor Coach Lines did not. Blue Motor has appealed. The City of Louisville, as one of the appellees, has filed a brief in which it is argued, in effect, that the judgment should be affirmed.

Blue Motor, since 1935, has maintained bus service between Camp Taylor, a suburb of Louisville, and the downtown section of the city, under a certificate of convenience and necessity issued first by the State Tax Commission and later by the State Department of Motor Transportation. No question is raised about the authority of Blue Motor to render such service prior to June 30, 1950. On that date the City of Louisville formally annexed approxi-

mately 95% of the Camp Taylor area. Blue Motor, subsequent to the judgment of annexation, made application to the city for a franchise covering the Camp Taylor area, but no franchise has been issued to it.

The Louisville Transit Company or its predecessor has furnished public transportation in the City of Louisville since 1890 under franchise from the city and certificate of public convenience and necessity from the proper regulatory agency of the state. In 1941 Transit purchased from the city, for a substantial consideration, a 20-year franchise under which it is now operating. By the terms of its franchise it is authorized to operate over all streets and highways of the city and is required to furnish city-wide transportation. Subsequent to the annexation judgment Transit applied to the city for authority to extend its service into the annexed portion of the Camp Taylor area. The requested authority was granted and since January, 1951, both Transit and Blue Motor have furnished transportation service in that area.

Blue Motor contends that by reason of the certificate which it holds from the Department of Motor Transportation authorizing such service, it has the right to maintain service in the same area it has served since 1935, regardless of the annexation proceedings by the city.

Transit argues that by reason of its franchise from the city and a certificate which it holds from the Department of Motor Transportation authorizing it to operate busses in the City of Louisville, it alone has the right to render such service within the city limits.

Before attempting to weigh these conflicting theories, we look briefly to those sections of the Constitution and statutes which may be applicable:

Kentucky Constitution, sections 163 and 164 as construed by this court in People's Transit Co. v. Louisville Railway Co., 220 Ky. 728, 295 S.W. 1055, confer upon cities the right of final decision as to whether a public utility may use or occupy the city streets for an intra-city service. Kentucky Constitution, section 3, contains, among other things, the provision that "every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment."

KRS 281.010(13) provides:

"(13) (a) A 'city bus certificate' means a certificate granting authority only for the operation of motor vehicles carrying passengers for hire between points within the corporate limits of a city and over regular routes.

"(b) A 'city bus' is a bus when being operated under one or more city bus certificates."

KRS 281.635(1) provides:

"Notwithstanding anything contained in this chapter:

"(1) All cities of the Commonwealth are vested with the power to sell franchises or, where no franchise is sold, grant authorizations for the operation of city busses over their streets and highways; provided, however, no person shall apply for or obtain any such franchise or authorization from any city without a prior finding by the department, after a hearing, that there is a demand and necessity for the service sought to be rendered, * * *. Upon certification by the department to such city that there is a demand and necessity for the service sought to be rendered, any city may award any duly qualified person a franchise or authorization covering the proposed operation. Upon acquiring such a franchise or authorization, the holder thereof shall apply to the Department of Motor Transportation for a city bus certificate which shall be issued to the holder of the franchise or authorization without a hearing."

KRS 281.665 provides:

"(1) Any bona fide motor carrier or its successor operating city busses as of December 31, 1949, under a valid certificate, franchise, statute, authorization, or in bona fide operation on said date, shall be entitled to such certificate or certificates and of such type or types as are defined in this chapter that cover their operations as of December 31, 1949." (This is the so-called "grandfather" statute upon which Blue Motor places much reliance.)

With these sections of the Constitution and statutes in mind, we look now to the authorization granted by the state to the opposing companies:

Transit, prior to 1950, held a common carrier certificate of public convenience and necessity issued by the Public Service Commisison in recognition of and as an incident of the franchise which it held from the City of Louisville. Following the Act of 1950 which created the state Department of Motor Transportation, that Department issued to Transit under the "grandfather" provisions of KRS 281.665 a city bus certificate as defined by KRS 281.010(13).

It should be noted that before 1950 the state issued only one type of certificate to motor carriers; i.e., a common carrier certificate without any distinction as to whether service rendered was within or without the corporate limits of a city. The 1950 Act authorized the Department to issue either a "city," "suburban," or "over-the-road" certificate, depending upon the type of service to be rendered. Hence, the last certificate issued to Transit was a city bus certificate in recognition of the type of service it renders.

Blue Motor, prior to 1950, also operated under a common carrier certificate, the certificate merely reading "from Louisville to Camp Taylor." Subsequent to the 1950 Motor Transportation Act, the Department issued to Blue Motor two certificates in lieu of its old common carrier certificate. One of the new certificates, covering territory outside the City of Louisville, was designated "suburban." The other certificate, which covers that part of Blue Motor's original territory which had been annexed by the city, was designated "city." These certificates also were issued in reliance upon the "grandfather" statute—KRS 281.665(1). The point is made that Blue Motor's new certificates were not issued until after Transit had already initiated bus service in the Camp Taylor area, but we do not regard the time element as significant. We think the rights of the parties became fixed as a matter of law when the Camp Taylor area was annexed in June, 1950.

We look now to what we consider the applicable law. It seems to us the logical starting point is the Kentucky Constitution, sections 163 and 164. It is clear from these two sections that the framers of the Constitution intended to confer upon cities the final right to decide whether a public utility may use or occupy the streets for an intra-

city service. As already mentioned, this court so held in the People's Transit Co. case, 220 Ky. 728, 295 S.W. 1055.

It is also apparent that the Legislature, in enacting the 1950 Motor Transportation Act, carefully refrained from encroaching upon this constitutional right of cities. For instance, it is provided in KRS 281.635 that notwithstanding anything contained in the Act "all cities of the Commonwealth are vested with the power to sell franchises or, where no franchise is sold, grant authorizations for the operation of city busses over their streets and highways * * *."

Moreover, there can be no doubt that Transit's franchise covers not only the territory within the boundaries of the city at the time the franchise was let, but also such additional territory as may from time to time be annexed by the city. In Truesdale v. City of Newport, Ky., 90 S.W. 589, 590, it was said "the limits of the city year by year determine the limits of the contract."

It must also be kept in mind that KRS 81.100 et seq.—formerly Kentucky Statutes, §§ 2760 and 2761, Acts of 1893—which authorize a city of the first class to annex adjacent territory were in full force and effect when Blue Motor first acquired its certificate from the state.

It is a familiar principle of constitutional law that constitutional and statutory provisions in effect at the time a contract is made become a part of the contract. City of Henderson v. Henderson Traction Co., 200 Ky. 183, 254 S.W. 332; Williams v. Nall, 108 Ky. 21, 55 S.W. 796; Deposit Bank of Owensboro v. Daviess County, 102 Ky. 174, 39 S.W. 1030, 44 L.R.A. 825; Armour Packing Co. v. United States, 209 U. S. 56, 28 S.Ct. 428, 52 L.Ed. 681; San Francisco-Oakland Terminal Rys. v. Alameda County, 66 Cal. App. 77, 225 P. 304; 12 Am. Jur. 769, section 240.

Opposed to this line of reasoning is the argument of Blue Motor which, briefly summarized, is this: The certificate of convenience and necessity which Blue Motor has operated under since 1935 is a special franchise equivalent to a contract between the certificate holder and the state. The rights granted by the certificate are property rights which cannot be impaired by subsequent action of the

state or an arm of the state. The Dartmouth College case, Trustees of Dartmouth College v. Woodward, 4 Wheat 518, 4 L.Ed. 629, familiar to all students of constitutional law, is cited on this point.

Blue Motor also points to the provision in KRS 281.635 (1) that no franchise shall be issued by a city without a prior finding by the Motor Transportation Department that there is a demand and necessity for the service sought to be rendered, and insists that in the absence of such certificate, Transit cannot, under any circumstances, properly extend its service into the Camp Taylor area. Transit admits, of course, that it did not obtain from the Department a certificate of convenience and necessity prior to the extension of its service.

It may be conceded that each of the theories presented in this case is a sound and logical principle of law when considered in the abstract. It is apparent, however, that both theories cannot have full application here. If each theory is projected to its logical conclusion the result, when applied to the facts of this case, is a "dead heat" so to speak, with a finding that both companies are entitled to maintain service in the Camp Taylor area. That, in effect, is what the Commissioner of Motor Transportation held, but this result would not be advantageous to the public or satisfactory to either of the companies. Consequently, we are faced not so much with the task of deciding which of the companies is right, but which of them has the superior right.

We think the rights of Transit are superior. Its rights come not only from the statutes, but from the Constitution. Conceding for the purpose of this discussion that the certificate which Blue Motor holds from the state has some of the attributes of a property right, that right is neither absolute nor irrevocable. Of some significance is the fact that the certificate must be renewed from year to year. Moreover, the original certificate was issued under a statute which was enacted subject to the constitutional provision which gives cities the final right to grant or to withhold permission to a utility to render an intra-city service using or occupying the city streets. At the time the original certificate was issued to Blue Motor the annex-

ation statute was in effect and even at that time there was a reasonable probability that the city would sometime in the future annex the Camp Taylor area. Hence, Blue Motor's certificate was issued subject to that contingency. When the area was annexed by the city it thereby was removed for most purposes from the jurisdiction of the state and was placed within the jurisdiction of the city. It follows that the rights of Blue Motor, which were derived from the state, must give way to the rights of Transit, which were derived from the city. It is pointed out by Blue Motor that a city is merely an arm of the state and that the city cannot do what the state itself cannot do. But that rule is not applicable here. The right of a city to control the letting of franchises to intra-city utilities is derived from the Constitution and to that extent the authority of the city is superior to that of the state.

The "grandfather" statute neither added to nor detracted from the rights of either company. That statute merely retained in status quo those rights which existed prior to December 31, 1949 by virtue of the old type certificates. Since Blue Motor had no authority to maintain intra-city bus service prior to December 31, 1949, the Department of Motor Transportation could not under authority of the "grandfather" statute confer such rights upon it.

If we were to uphold the right of Blue Motor to render bus service within the city limits of Louisville without first obtaining a franchise from the city, we would be in the anomalous position of approving something which is expressly prohibited by sections 163 and 164 of the Constitution. Not only that, but we would at least be required to modify the language used in People's Transit Co. v. Louisville Railway Co., and Truesdale v. City of Newport, referred to above. While the identical question with which we are now concerned was not before the court in those cases, we think the language of the opinions supports in principle Transit's position.

It is argued by Blue Motor that the hearing notice issued by the Department of Motor Transportation did not include the question of Blue Motor's right to render intra-

city service, and that issue should not have been decided by the Department. We find from the preliminary proceedings before the Department's examiner that there was at least an implied consent, if not an express agreement, that the purpose of the hearing was to determine the respective rights of both carriers to operate in the Camp Taylor area. The examiner so stated the issue at the commencement of the hearing and Blue Motor having acquiesced in that statement may not now complain of a defect in the hearing notice.

The contention that rights guaranteed to Blue Motor by the Federal Constitution have been violated has been considered and found not to be sustainable.

The judgment is affirmed.

Mandate

THE COMMONWEALTH OF KENTUCKY, THE COURT OF APPEALS

Spring Term, June 25, 1954

RAY WHITAKER, et al d/b/a Blue Motor Coach Lines

v.

LOUISVILLE TRANSIT CO., et al

and

CITY OF LOUISVILLE

v.

DEPARTMENT OF MOTOR TRANSPORTATION, et al

Appeal from a Judgment of the Franklin Circuit Court

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellees recover of the appellants their cost herein expended.

Judge Duncan dissents from the opinion insofar as it holds that extending the City boundaries destroyed Blue Motor's right to operate in the annexed area.

A copy—Attest:

ACREE AUSTIN, C. C. A.

By /s/ IRENE C. AUSTIN, D. C.

Issued January 11, 1955

APPENDIX B

Statutes Involved

Constitution of the Commonwealth of Kentucky

4 PROCEEDINGS AND DEBATES, KENTUCKY CONSTITUTIONAL CONVENTION (1891) 6024, 6041

Sec. 3. All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.

Sec. 163. No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has, in good faith, been begun thereunder, the provisions of this section shall not apply.

Sec. 164. No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such mu-

nicipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

Kentucky Revised Statutes (1954)

CHAPTER 81: CITY CLASSIFICATION, BOUNDARIES AND ANNEXATION[1]

81.100. *Annexation of unincorporated territory or reduction of territory by first-class city.*

The boundaries of cities of the first class[2] shall remain as established by law until changed as provided in KRS 81.100 to 81.130. Whenever a city of the first class desires to annex any unincorporated territory or to reduce the boundaries of the city, the city legislative body may enact an ordinance, defining accurately the boundary of the territory proposed to be annexed or stricken off. The ordinance shall be published in at least ten issues of the daily paper published in and having the largest circulation in the city. In not less than thirty days after the enactment of the ordinance, if the publication has been made and no petition has been filed in the circuit court as provided in KRS 81.110, the city legislative body may enact another ordinance annexing to the city or striking from the city the territory described in the ordinance. Upon the enactment of this ordinance, the territory shall become part of the city, or be stricken from the city.

81.110. *Protest against annexation of unincorporated territory or reduction of territory by first-class city; trial; judgment.*

---

[1] Originally enacted as Kentucky Acts, 1893, c. 244, §§ 254-257. Numerous minor amendments have been made over the years by statute and by repeated re-codification. The current text, given above, is identical with that under which the annexation of the Camp Taylor area was accomplished in 1950, and is not materially different from the text in effect in 1935.

[2] Louisville is the only city of the first class, KRS (1954) § 81.010(1).

(1) Within thirty days after the enactment of an ordinance proposing to annex unincorporated territory to a first-class city, or to reduce its limits, one or more residents or freeholders of the territory proposed to be annexed or stricken off may file a petition in the circuit court of the county, setting forth the reasons why the territory or any part of it should not be annexed, or why the limits should not be reduced. Summons shall issue on the petition and be executed on the chief executive office of the city, and the answer of the city shall be filed within twenty days after service of the summons. The case shall be tried according to the practice prescribed for the trial of jury cases.

(2) If the jury finds, upon a hearing, that less than seventy-five percent of the freeholders of the territory to be annexed or stricken off have remonstrated, and that the adding or striking off of the territory will be for the interest of the city, and will cause no manifest injury to the persons owning real estate in the territory sought to be annexed or stricken off, the annexation or reduction shall be approved and become final. If the jury finds that seventy-five per cent or more of the resident freeholders of the territory sought to be annexed or stricken off have remonstrated, the annexation or reduction shall not take place, unless the jury finds from the evidence that a failure to annex or strike off will materially retard the prosperity of the city, and of the owners and inhabitants of the territory sought to be annexed or stricken off, in which case the annexation or reduction shall take place nowithstanding the remonstrance.

(3) An appeal from the judgment may be taken as in other cases, but there shall be no change of venue from the county. Costs shall follow the judgment.

(4) The judgment shall, when entered, be certified to the city legislative body, which may thereupon annex to or strike from the city the territory described in the judgment, and the territory shall then become, or cease to become, a part of the city.

Kentucky Revised Statutes (1950)

CHAPTER 281: MOTOR CARRIERS[1]

281.010. *Definitions.* As used in this chapter, unless the context requires otherwise,—

• • •

(13)(a) A "city bus certificate" means a certificate granting authority only for the operation of motor vehicles carrying passengers for hire between points within the corporate limits of a city and over regular routes.

(b) A "city bus" is a bus when being operated under one or more city bus certificates.

• • •

281.635. *City franchises for city busses; requirement of certificate; powers of cities to regulate bus operations; powers of cities concerning taxicabs; rate regulation.*

Notwithstanding anything contained in this chapter:

(1) All cities of the Commonwealth are vested with the power to sell franchises or, where no franchise is sold, grant authorizations for the operation of city busses over its streets and highways; provided, however, no person shall apply for or obtain any such franchise or authorization from any city without a prior finding by the Department, after a hearing, that there is a demand and necessity for the service sought to be rendered, which finding shall be valid and effective for a period of one year from and after the date thereof, exclusive of any delay due to the order of any court. Upon certification by the Depart-

[1] A general revision of the laws applicable to motor carriers was enacted as Kentucky Acts, 1950, c. 63, effective June 15, 1950. The excerpts given here are §§ 7(m), 14(a)-(c), 14(f)-(h) and 20. These provisions have not been changed since June 15, 1950, except that (a) § 281.010(13) was renumbered by Kentucky Acts (1954), c. 188, § 1, and is now designated § 281.010(14), (b) a new § 281.010(14)(c), dealing with license plates for city busses, was added by the same section, and (c) a number of additional subsections were added to § 281.665 by Kentucky Acts (1954), c. 188, § 6 dealing principally with certain special forms of transportation service. These changes do not appear to affect the questions presented in the case at bar.

ment to such city that there is a demand and necessity for the service sought to be rendered, any city may award any duly qualified person a franchise or authorization covering the proposed operation. Upon acquiring such a franchise or authorization, the holder thereof shall apply to the Department of Motor Transportation for a city bus certificate which shall be issued to the holder of the franchise or authorization without a hearing. Unless a certificate is exercised within one year from the grant thereof, exclusive of any delay due to the order of any court, the authority conferred by the issuance of the certificate of convenience and necessity shall be void.

(2) The applicant for a certificate or renewal of a certificate to operate a city bus shall at the time of application file with the Department a map or maps showing the route or routes and territory proposed to be served, together with a time schedule, and shall thereafter, during the license year, file only such additional maps or time schedules as the Commissioner may require.

(3) The governing body of any city of the first four classes in the Commonwealth in which city busses operate shall have supervisory and regulatory power over such city busses, while operating in such city, and shall have authority to enforce all ordinances or regulations pertaining to routes, services, time schedules and operation of said city busses and the drivers thereof, provided that any interested party may appeal to the Department from any action, finding or order of any such city within thirty days after the entry of such action, finding or order, and a hearing shall be held before the Department in the same manner as other hearings are held as provided for in this chapter; provided, however, that any such action, finding or order of any such city shall be sustained if there is substantial evidence or reason to support it; otherwise the Department shall make such orders as it deems necessary and proper. However, where a carrier's entire operation is confined to intracity transportation within the corporate limits of a single city, there shall be no appeal to the Department from the actions, findings or orders of such a

city. Provided further, that where any city bus is subject to the regulatory powers of more than one city and such regulations are in conflict or such as to impede the transportation facilities serving such cities, or the carrier is failing to furnish safe, adequate and convenient service to the public, the Department may, upon complaint or on its own initiative, call a hearing and enter such orders as are necessary and proper.

• • •

(6) Until such time as any city of the Commonwealth enacts such ordinances or prescribes such rules and regulations as may be reasonably necessary to exercise the prior powers herein delegated to such cities respecting the supervision and regulation of city busses, taxicabs and taxicab drivers, the Department shall possess such powers and may, by regulation, prescribe such rules as may be reasonably necessary to supervise and control city busses, taxicabs and taxicab drivers, having regard for the public safety and the public need for service.

(7) If any city fails to exercise any of the authority granted it herein, such authority shall be vested in the Department.

(8) The power to regulate rates fixed by agreement with a city. The Department may, under the provisions of this chapter, originate, establish, change, promulgate and enforce any rate that has or may be fixed by any contract, franchise or agreement between the holder of any city bus certificate and any city, and all rights and obligations arising out of such contract regulating any such rate shall be subject to the jurisdiction and supervision of the Department, but no such rate shall be changed nor any contract, franchise or agreement affecting it be abrogated or changed until a hearing has been had.

• • •

281.665. *Grandfathering of city bus operations, and of certificates and permits.*

(1) Any bona fide motor carrier or its successor operating city busses as of December 31, 1949, under a valid cer-

tificate, franchise, statute, authorization, or in bona fide operation on said date, shall be entitled to such certificate or certificates and of such type or types as are defined in this chapter that cover their operations as of December 31, 1949.

(2) Any holder of any other type of valid certificate or permit issued prior to June 15, 1950, shall be entitled, upon renewal, to such certificates or permits, as the case may be, that will grant the holder thereof the same authority that the certificates or permits held on June 15, 1950 granted.

(3) All certificates or permits grandfathered shall be subject to the same limitations and restrictions as were imposed on such certificate or permit, and if the validity of any certificate or permit issued by the Division of Motor Transportation was in litigation on December 31, 1949 and is finally held to be invalid, then such certificate or permit shall not be grandfathered.

JUN 6 195
HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

October Term 1954.

No. [redacted] 62

RAY WHITAKER and HARRY L. SWAIM, Doing Business as BLUE MOTOR COACH LINES, - - - - - - - - - Appellants,

versus

LOUISVILLE TRANSIT CO., CITY OF LOUISVILLE and DEPARTMENT OF MOTOR TRANSPORTATION OF THE COMMONWEALTH OF KENTUCKY, - - - Appellees.

On Appeal from the Court of Appeals of Kentucky.

MOTION TO DISMISS
AND
BRIEF IN SUPPORT THEREOF
OF
LOUISVILLE TRANSIT CO., APPELLEE.

JOHN E. TARRANT,
The Seventeenth Floor,
Kentucky Home Life Bldg.,
Louisville 2, Ky.,
EARL S. WILSON,
RUCKER TODD,
Counsel for Appellee, Louisville Transit Co.

BULLITT, DAWSON & TARRANT,
Of Counsel.

Dated June 1, 1955.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

October Term 1954.

No. 774.

RAY WHITAKER and HARRY L. SWAIM, Doing Business as BLUE MOTOR COACH LINES, *Appellants,*

v.

LOUISVILLE TRANSIT CO., CITY OF LOUISVILLE and DEPARTMENT OF MOTOR TRANSPORTATION OF THE COMMONWEALTH OF KENTUCKY, - - - - - - - *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

MOTION TO DISMISS.

Louisville Transit Co., appellee herein, moves this Court to dismiss with costs the appeal taken herein to this Court by Ray Whitaker and Harry L. Swaim, doing business as Blue Motor Coach Lines, appellants, upon the ground that the appeal does not present a substantial Federal question; and in support thereof files herewith its brief.

JOHN E. TARRANT,
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Louisville 2, Ky.,

EARL S. WILSON,
RUCKER TODD,
Counsel for Appellee,
Louisville Transit Co.

BULLITT, DAWSON & TARRANT,
Of Counsel.

Dated June 1, 1955.

SUPREME COURT OF THE UNITED STATES

October Term 1954.

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On Appeal from the Court of Appeals of Kentucky.

BRIEF FOR LOUISVILLE TRANSIT CO., APPELLEE, IN SUPPORT OF MOTION TO DISMISS.

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Dated June 1, 1955.

INDEX TO BRIEF

PAGE

THE QUESTION 1– 2

STATEMENT OF THE CASE..... 3–12

1. *Blue Motor's Certificate and Service*..... 3

2. *The Proceedings Below*..... 3– 6

3. *The Kentucky Law Which Became a Part of Blue Motor's Certificate When Issued in 1935*.. 6–10

People's Transit Co. v. *Louisville Railway Co.*, 220 Ky. 728, 295 S. W. 1055..... 6

Kentucky Constitution §§s 163 and 164..... 6

Union Light, Heat & Power Co. v. *Railroad Commission*, 17 F. 2d 143..... 7

KRS 81.100 *et seq*..... 8

Truesdale v. *City of Newport*, 28 K. L. R. 840, 90 S. W. 589 8

Deposit Bank of Owensboro v. *Daviess County*, 102 Ky. 174, 39 S. W. 1030..... 10

Williams v. *Nall*, 108 Ky. 21, 55 S. W. 706..... 10

City of Henderson v. *Henderson Traction Co.*, 200 Ky. 183, 254 S. W. 332..... 10

4. *The Essence of this Blue Motor Decision*.....10–11

Ky. Const. §§s 163 and 164..... 10

PAGE

5. *Blue Motor's Specification of the Kentucky Constitutional and Statutory Provisions Which It Claims Impaired the Obligation of Its So-called Contract and Deprived It of Its Claimed Property* 12

28 *U. S. C.* §1257(2) 12
Kentucky Constitution, §§s 3, 163 and 164. 12
Kentucky Revised Statutes, §§s 81.100 et seq. . . 12
Kentucky Revised Statutes, § 281.635. 12
Kentucky Revised Statutes, § 281.665. 12
Kentucky Revised Statutes, § 281.010(13). 12

SUMMARY OF POINTS DISCUSSED. 13

FIRST POINT: The Provisions of the 1950 Kentucky Motor Transportation Law Attacked by Blue Motor Are Not Unconstitutional. 13–18

KRS 281.840 13
KRS 281.595 13
KRS 281.600 13
KRS 281.615 . . . . . 14, 16
KRS 281.010(13) 14, 16
KRS 281.010(14) 14, 16
KRS 281.635 . . . . . 14, 15
KRS 281.665 . . . . . 14, 16
People's Transit Co. v. *Louisville Railway Co.*, 220 Ky. 728, 295 S. W. 1055. 15
Union Light, Heat & Power Co. v. *Railroad Commission*, 17 F. 2d 148. 15

PAGE

SECOND POINT: The Validity of the Annexation Statutes (*KRS* 81.100, *et seq.*), Under Which Louisville Annexed the Camp Taylor Area, Is Beyond Question 18–20

Acts 1893, c. 244 18
Williams v. *Nall*, 108 Ky. 21, 55 S. W. 706 19
City of Henderson v. *Henderson Traction Co.*, 200 Ky. 183, 254 S. W. 332 19
Rees v. *City of Watertown*, 19 Wall. 107 19
Armour Packing Co. v. *United States*, 209 U. S. 56 19
KRS 81.100 *et seq* 20

THIRD POINT: The Validity of *Ky. Const.* §§s 3, 163 and 164 Is Beyond Question 20–24

Ky. Const., § 3 ..... 20, 21
Ky. Const., § 163 ..... 20, 21
People's Transit Co. v. *Louisville Railway Co.*, 220 Ky. 728, 295 S. W. 1055 ..... 21, 22
Ky. Const., § 164 ..... 20, 21
KRS 81.100 21
Fleming v. *Fleming*, 264 U. S. 29 22
Barrows v. *Jackson*, 346 U. S. 249 22
Union Light, Heat & Power Co. v. *Railroad Commission*, 17 F. 2d 148 23
United States Fidelity & Guaranty Co. v. *Oklahoma*, 250 U. S. 111 23

FOURTH POINT: Blue Motor's Argument that the Decision in This Blue Motor Case Will Obstruct the Development Nationally of Public Utility Services Is Completely Irrevelant 24–25

Ky. Const. §§s 163 and 164 25

PAGE

FIFTH POINT: The Cases Cited by Blue Motor Are Not in Point 25–28

Detroit United Railways v. *Michigan*, 242 U. S. 238 25

Town of Fultondale v. *Clelland Bus Lines*, 254 Ala. 225, 48 So. 2d 21..... 26

Ky. Const. §§s 163 and 164..... 27

Irvine Toll Bridge Co. v. *Estill County*, 210 Ky. 170, 174, 275 S. W. 634, 636..... 27

People's Transit Co. v. *Louisville Railway Co.*, 220 Ky. 728, 736, 295 S. W. 1055, 1058..... 27

Ex Parte Ashworth, 86 So. 84, 85..... 28

City of Mobile v. *Farrell, et al.*, 158 So. 539, 540-541 28

Phenix City v. *Alabama Power Co.*, 195 So. 894, 899 28

Evergreen Trailways, Inc. v. *City of Renton*, 38 Wash. 2d 82, 228 P. 2d 119..... 28

Arkansas Power & Light Co. v. *West Memphis Power & Water Co.*, 187 Ark. 41, 58 S. W. 2d 206 28

San Francisco-Oakland Terminal Railways v. *Alameda County, et al.*, 66 Calif. App. 77, 225 P. 304 28

City of Wichita Falls v. *Bowen*, 143 Tex. 45, 182 S. W. 2d 695 28

CONCLUSION 29

LIST OF AUTHORITIES.

Cases:

	PAGE
Arkansas Power & Light Co. v. *West Memphis Power & Water Co.*, 187 Ark. 41, 58 S. W. 2d 206	28
Armour Packing Co. v. *United States*, 209 U. S. 56.	19
Barrows v. *Jackson*, 346 U. S. 249	22
City of Henderson v. *Henderson Traction Co.*, 200 Ky. 183, 254 S. W. 332	10, 19
City of Mobile v. *Farrell, et al.*, 158 So. 539, 540-541	28
City of Wichita Falls v. *Bowen*, 143 Tex. 45, 182 S. W. 2d 695	28
Deposit Bank of Owensboro v. *Daviess County*, 102 Ky. 174, 39 S. W. 1030	10
Detroit United Railways v. *Michigan*, 242 U. S. 238	25
Evergreen Trailways, Inc. v. *City of Renton*, 38 Wash. 2d 82, 228 P. 2d 119	28
Ex Parte Ashworth, 86 So. 84, 85	28
Fleming v. *Fleming*, 264 U. S. 29	22
Irvine Toll Bridge Co. v. *Estill County*, 210 Ky. 170, 174, 275 S. W. 634, 636	27
People's Transit Co. v. *Louisville Railway Co.*, 220 Ky. 728, 295 S. W. 1055	2, 6, 9, 15, 21, 22, 27
Phenix City v. *Alabama Power Co.*, 195 So. 894, 899	28
Rees v. *City of Watertown*, 19 Wall. 107	19
San Francisco-Oakland Terminal Railways v. *Alameda County, et al.*, 66 Calif. App. 77, 225 P. 304	28
Town of Fultondale v. *Clelland*, 254 Ala. 225, 48 So. 2d 21	26
Truesdale v. *City of Newport*, 28 K. L. R. 840, 90 S. W. 589	8
Union Light, Heat & Power Co. v. *Railroad Commission*, 17 F. 2d 143	7, 15, 23
United States Fidelity & Guaranty Company v. *Oklahoma*, 250 U. S. 111	23
Williams v. *Nall*, 108 Ky. 21, 55 S. W. 706	10, 19

Kentucky Constitution:

PAGE

Ky. Const., § 3 ..... 12, 20, 21

Ky. Const., § 163 ..... 2, 6, 9, 10, 12, 15, 20, 21, 25, 27

Ky. Const., § 164 ..... 2, 6, 9, 10, 12, 15, 20, 21, 25, 27

Kentucky Revised Statutes:

KRS 81.100 *et seq.*, (*Acts* 1893, c. 244) .. 2, 8, 12, 18, 20, 21

KRS 281.010 (13) 12, 14, 16

KRS 281.010 (14) 14, 16

KRS 281.595 13

KRS 281.600 13

KRS 281.615 ..... 14, 16

KRS 281.635 ..... 12, 14, 15

KRS 281.665 ..... 12, 14, 16

KRS 281.840 13

Federal Statutes:

28 *U. S. C.* § 1257 (2) 12

Supreme Court of the United States

October Term 1954.

No. 774.

RAY WHITAKER and HARRY L. SWAIM, Doing Business as BLUE MOTOR COACH LINES, *Appellants,*

v.

LOUISVILLE TRANSIT CO., CITY OF LOUISVILLE and DEPARTMENT OF MOTOR TRANSPORTATION OF THE COMMONWEALTH OF KENTUCKY, - - - - - - - *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

BRIEF OF APPELLEE, LOUISVILLE TRANSIT CO., IN SUPPORT OF MOTION TO DISMISS.

THE QUESTION.

Blue Motor's appeal herein presents no substantial Federal question.

In 1935, Blue Motor received from the proper Kentucky State agency an annually renewable common carrier certificate authorizing it to operate motor busses "from Louisville to Camp Taylor," an adjacent unin-

corporated area, but not authorizing it to engage in *intracity* operations in Louisville. At that time, *Kentucky Constitution* §§s 163 and 164 (adopted 1891) provided, as held in *People's Transit Co.* v. *Louisville Railway Co.*, 220 Ky. 728, 295 S. W. 1055 (decided 1927), that no motor bus operator could engage in intracity transportation of passengers in Louisville without first obtaining a franchise from Louisville; the *Kentucky Annexation Statutes,* Acts 1893 c. 244, now *KRS* 81.100, *et seq.,* permitted Louisville to annex adjacent unincorporated areas, as it did the Camp Taylor area in 1950; and under the settled law of Kentucky those constitutional and statutory provisions became a part of Blue Motor's certificate as fully as if written therein.

Blue Motor's certificate was thus issued, acquired and held (1) subject to the possibility that Louisville might annex the Camp Taylor area, and (2) subject to the condition that, if Louisville did so, Blue Motor could no longer operate therein without obtaining a franchise from Louisville. Consequently, there could be no impairment of contract or deprivation of property without due process when, upon annexation of the Camp Taylor area by Louisville in 1950, Blue Motor lost its right to operate therein unless it acquired a franchise from Louisville.

STATEMENT OF THE CASE.

1. Blue Motor's Certificate and Service.

In 1935, Blue Motor obtained a common carrier certificate renewable annually authorizing it to render passenger service by bus "*from* Louisville *to* Camp Taylor," an adjacent unincorporated area, but not authorizing it to engage in any *intracity* carriage of passengers within Louisville.

On June 30, 1950, Louisville annexed the greater part of the Camp Taylor area.

For many years, Blue Motor's service in the Camp Taylor area had been inadequate and the residents of Camp Taylor had repeatedly urged and petitioned Louisville Transit Co. to extend its city-wide service into Camp Taylor.[1] As a result of this pressure from the Camp Taylor area, on January 28, 1951, Louisville Transit Co., under its city-wide franchise requiring it to furnish city-wide service, and pursuant to specific authorization from Louisville, extended its lines into Camp Taylor.

2. The Proceedings Below.

On February 7, 1951, Blue Motor for the first time applied to the Department of Motor Transportation of the Commonwealth of Kentucky for a "City Bus Certificate" to engage in intracity transportation in the Camp Taylor area.[2]

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[1]R 349-350, 419-421, 430-431, 434-436, 437.
[2]R 291.

On February 12, 1951, Louisville Transit Co. protested Blue Motor's application for a "City Bus Certificate" on the ground that Blue Motor had not obtained a franchise from Louisville, and on February 27, 1951, filed a more elaborate protest.[3]

On February 28, 1951, the Department issued the City Bus Certificate to Blue Motor.[4] Thereafter Louisville Transit Co. moved the Department to cancel the City Bus Certificate illegally issued to Blue Motor, but after a full hearing the Department declined to do so, saying in its order[5]:

> "The only remaining issue concerns the fact that Blue Motor is conducting a city bus operation within the corporate limits of the City without possessing a franchise in accordance with Section 163 and 164 of the *Constitution of Kentucky.* Although the Commissioner fully realizes that it is his duty * * * to uphold all provisions of the *Constitution of Kentucky,* he feels * * * that the absence of a franchise in the present case is a matter which lies between the City and Blue Motor * * *. Therefore, the Commissioner does not rule upon this issue."

On March 24, 1952, Louisville Transit Co. appealed to the Franklin Circuit Court from the order of the Department.

On October 2, 1953, the Franklin Circuit Court held that the Department had erroneously issued to Blue

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[3]R 175-177, 179-187.
[4]Ex. 3, R 288, 449.
[5]R 280.

Motor a City Bus Certificate and cancelled that certificate, saying[6]:

> "Blue Motor had no right to engage in intracity transportation of passengers for hire in the Camp Taylor area of Louisville, which area was annexed and became a part of Louisville on June 30, 1950. The Department erroneously issued to Blue Motor City Bus Certificate No. 800, which purported to authorize Blue Motor to engage in intracity transportation of passengers for hire in the said Camp Taylor area of Louisville. The Department erroneously held that Blue Motor was entitled to continue to hold such certificate and to engage in such transportation. A franchise from Louisville was, and is, a prerequisite under both the *Kentucky Constitution* and the Kentucky Statutes to engage in such intracity transportation. Blue Motor held no such franchise and said certicate was and is void and all operations thereunder were and are illegal.
>
> WHEREFORE, it is ordered and adjudged:
>
> (a) That said City Bus Certificate No. 800 and any renewal thereof be and the same is hereby set aside, cancelled and held for naught and Blue Motor is ordered and directed immediately to surrender said certificate to the Department for cancellation and immediately to discontinue any and all intracity transportation of passengers for hire in Louisville over any of the routes specified in said City Bus Certificate No. 800."

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[6]R 95-96.

On January 10, 1955, the Kentucky Court of Appeals affirmed the judgment of the Franklin Circuit Court.

Blue Motor appealed to this Court.

3. *The Kentucky Law Which Became a Part of Blue Motor's Certificate When Issued in 1935.*

Prior to the issuance to Blue Motor in 1935 of a certificate authorizing it to operate busses from Louisville to the then unincorporated adjacent Camp Taylor area, but *not authorizing any intracity carriage* of passengers within Louisville, the Kentucky Court of Appeals in *People's Transit Co.* v. *Louisville Railway Co.*, 220 Ky. 728, 295 S. W. 1055 (decided 1927), had held that Louisville Railway Co., which was subsequently consolidated into Louisville Transit Co. and which held a city-wide franchise from Louisville, could enjoin People's Transit Co., which had no city franchise, from operating a competing bus line for the *intracity* carriage of passengers for hire within Louisville and pointed out that *Kentucky Constitution* §§s 163 and 164 (adopted in 1891) required a bus company to obtain a city franchise from Louisville before engaging in intracity transportation within Louisville. In speaking of *Kentucky Constitution* §§s 163 and 164 the Kentucky Court of Appeals said (295 S. W. 1058, 1060):

> "The one [*Ky. Const.* § 163] withheld the right of the Legislature to grant the franchise for purely intraurban operations, and conferred that right exclusively upon the city authorities, while the other [*Ky. Const.* § 164] prescribed a mandatory method

by which the municipality might create and grant the franchise to be operated exclusively, or substantially so, within its corporate limits. * * *

"There is, therefore, no room for the contention that defendant, while engaged in the operation of its busses over the streets of Louisville in the manner hereinbefore pointed out was not doing so in the exercise of such a franchise as was and is contemplated by section 164, *supra,* of our *Constitution.* * * *

"We therefore conclude that the operation of defendant's busses over the streets of the city in the manner and for the purpose indicated, * * * was such a use of the streets for the purpose of performing such a public service as required it to obtain a franchise as prescribed in section 164 of the *Constitution,* * * *."

In 1927, concerning these same constitutional provisions, a three-judge Federal Court in *Union Light, Heat & Power Co.* v. *Railroad Commission,* 17 F. 2d 143, had said (17 F. 2d 148):

"These two sections of the *Constitution* took away from the General Assembly the power to grant local franchises, and expressly vested that power in the municipalities of the state."

In this Blue Motor case, the Kentucky Court of Appeals said (274 S. W. 2d 392, 394, 395):

"*Kentucky Constitution,* sections 163 and 164 as construed by this court in *People's Transit Co.* v. *Louisville Railway Co.,* 220 Ky. 728, 295 S. W. 1055, confer upon cities the right of final decision as to whether a public utility may use or occupy the city streets for an intra-city service. * * *

"It seems to us the logical starting point is the *Kentucky Constitution,* sections 163 and 164. It is clear from these two sections that the framers of the Constitution intended to confer upon cities the final right to decide whether a public utility may use or occupy the streets for an intra-city service. As already mentioned, this court so held in the *People's Transit Co.* case, 220 Ky. 728, 295 S. W. 1055. * * *

"If we were to uphold the right of Blue Motor to render bus service within the city limits of Louisville without first obtaining a franchise from the city, we would be in the anomalous position of approving something which is expressly prohibited by sections 163 and 164 of the *Constitution.*"

On July 1, 1893, the statute (now *KRS* 81.100 *et seq.*) authorizing Louisville to annex adjacent territory became effective and has continuously remained in effect since that time.

Since 1890, Louisville Transit Co. and its principal predecessor, Louisville Railway Co., have held franchises from Louisville authorizing and obligating them to furnish *city-wide intracity* transportation of passengers.

In 1906 the Kentucky Court of Appeals in *Truesdale* v. *City of Newport,* 28 K. L. R. 840, 90 S. W. 589, stated that a city-wide franchise, even though silent as to territory subsequently annexed, covered that territory. In its opinion, in this *Blue Motor* case the Kentucky Court of Appeals said (274 S. W. 2d 394):

"Moreover, there can be no doubt that Transit's franchise covers not only the territory within

> the boundaries of the city at the time the franchise was let, but also such additional territory as may from time to time be annexed by the city. In *Truesdale* v. *City of Newport, Ky.*, 90 S. W. 589, 590, it was said 'the limits of the city year by year determine the limits of the contract.' "

It is thus to be noted that in 1935, when Blue Motor first obtained from the proper State agency its one year annually renewable certificate, permitting operations "from Louisville to Camp Taylor" *but not intracity within Louisville,*

(1) The presently existing Kentucky Annexation Statutes provided that Louisville could annex that area,

(2) The Kentucky Court of Appeals in 1906 had held in the *Truesdale* case that, if Louisville did annex that area, Louisville Transit Co.'s city-wide franchise extended to that area,

(3) The Kentucky Court of Appeals in 1927 had held in the *People's Transit* case that *Kentucky Constitution* §§s 163 and 164 required any person desiring to furnish *intracity* motor bus service in Louisville to obtain a franchise from Louisville before doing so, and

(4) The Kentucky Court of Appeals had likewise held in the same *People's Transit* case that Louisville Transit Co.'s predecessor could enjoin the operation of competing intracity motor busses by persons not holding a franchise from Louisville.

(5) These contingencies became integral parts of Blue Motor's certificate when it was issued as fully as if they had been written therein.

Concerning this the Kentucky Court of Appeals said in this *Blue Motor* case (274 S. W. 2d 394):

> "It is a familiar principle of constitutional law that constitutional and statutory provisions in effect at the time a contract is made become a part of the contract."

The Kentucky Court of Appeals had so held in 1897 in *Deposit Bank of Owensboro* v. *Daviess County,* 102 Ky. 174, 39 S. W. 1030; in 1900 in *Williams* v. *Nall,* 108 Ky. 21, 55 S. W. 706; and in 1923 in *City of Henderson* v. *Henderson Traction Co.,* 200 Ky. 183, 254 S. W. 332.

4. The Essence of This Blue Motor Decision.

The Kentucky Court of Appeals simply held that before Blue Motor can engage in *intracity* transportation in Louisville it must obtain a franchise from Louisville as is required by *Kentucky Constitution* §§s 163 and 164 (adopted in 1891), which were in force at the time Blue Motor's certificate was initially issued and therefore, in effect, were written into Blue Motor's certificate when issued. The Kentucky Court of Appeals has thus only held that Blue Motor must comply with a condition subject to which its certificate was issued.

Surely there can be no violation of the Federal Constitution by requiring Blue Motor to comply with *Kentucky Constitution* §§s 163 and 164 which had been in

effect for 44 years before its certificate was issued; were in effect at the time of its issuance; and are still in effect.

The Kentucky Court of Appeals aptly summed up its decision as follows (274 S. W. 2d 395):

> "Conceding for the purpose of this discussion that the certificate which Blue Motor holds from the state has some of the attributes of a property right, that right is neither absolute nor irrevocable. Of some significance is the fact that the certificate must be renewed from year to year. Moreover, the original certificate was issued under a statute which was enacted subject to the constitutional provision which gives cities the final right to grant or to withhold permission to a utility to render an intra-city service using or occupying the city streets. At the time the original certificate was issued to Blue Motor the annexation statute was in effect and even at that time there was a reasonable probability that the city would sometime in the future annex the Camp Taylor area. Hence, Blue Motor's certificate was issued subject to that contingency. When the area was annexed by the city it thereby was removed for most purposes from the jurisdiction of the ~~city~~ State. * * * The right of a city to control the letting of franchises to intra-city utilities is derived from the *Constitution* and to that extent the authority of the city is superior to that of the state."

5. Blue Motor's Specification of the Kentucky Constitutional and Statutory Provisions Which It Claims Impaired the Obligation of Its So-called Contract and Deprived It of Its Claimed Property.

In its Notice of Appeal to this Court, Blue Motor specified that the appeal was taken pursuant to 28 *U. S. C.* § 1257 (2), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

In its Notice of Appeal and in its Jurisdictional Statement (p. 3), Blue Motor specifies the Kentucky statutes, the validity of which it seeks to draw in question, as follows:

(1) *Kentucky Constitution,* §§s 3, 163 and 164;

(2) *Kentucky Revised Statutes,* §§s 81.100, *et seq.;*

(3) *Kentucky Revised Statutes,* §§s 281.635-(1)-(3) and (6)-(8), 281.665 and 281.010(13).

We shall deal with these specifications of the statutes, the validity of which is questioned, in the inverse order of Blue Motor's statement thereof.

SUMMARY OF POINTS DISCUSSED.

1. **The Provisions of the 1950 Kentucky Motor Transportation Law Attacked by Blue Motor Are Not Unconstitutional.**
2. **The Validity of the Annexation Statutes (*KRS* 81.100, *et seq.*), Under Which Louisville Annexed the Camp Taylor Area Is Beyond Question.**
3. **The Validity of *Ky. Const.* §§s 3, 163 and 164 Is Beyond Question.**
4. **Blue Motor's Argument that the Decision in This Blue Motor Case Will Obstruct the Development Nationally of Public Utility Services Is Completely Irrelevant.**
5. **The Cases Cited by Blue Motor Are Not in Point.**

FIRST POINT.

The Provisions of the 1950 Kentucky Motor Transportation Law Attacked by Blue Motor Are Not Unconstitutional.

On June 15, 1950, a new Kentucky Motor Transportation Law went into effect which (1) abolished the Division of Motor Transportation[7] which had theretofore had jurisdiction over Blue Motor's operation, (2) created the Department of Motor Transportation[8] and conferred upon the Department all administrative functions of the state in relation to motor transportation[9], (3) provided that "no person shall act as a motor carrier without first having obtained a certifi-

[7] *KRS* 281.840.
[8] *KRS* 281.595.
[9] *KRS* 281.600.

cate * * * from the department"[1], and (4) provided for the grandfathering of outstanding certificates into (a) "City Bus Certificates" for "the operation of motor vehicles carrying passengers for hire between points within the corporate limits of a city and over regular routes"[2], (b) "Suburban Bus Certificates" for "the operation of motor vehicles carrying passengers for hire within the confines of one or more cities and their suburban area, or a suburban area, over regular routes *but not granting authority to engage in intracity transportation*"[3], and (c) Regular Route Common Carrier Bus Certificates for other operations.

Blue Motor has specified as constitutionally objectionable (a) the 1950 Kentucky Motor Transportation Law section recognizing the constitutional right of Kentucky cities to require the acquisition of city franchises for intracity utility operation (*KRS* 281.635), (b) the grandfathering section (*KRS* 281.665), and (c) the definition of "City Bus" and "City Bus Certificate" section (*KRS* 281.010(13)).

Actually, the situation here involved is exactly the same as it would have been had the 1950 Kentucky Motor Transportation Law never been enacted.

If that Law had not been enacted, Blue Motor at the time of the June 30, 1950 annexation of the Camp Taylor area by Louisville would have held a common carrier certificate authorizing transportation of passengers *"from* Louisville *to* Camp Taylor" but not

[1] *KRS* 281.615.
[2] *KRS* 281.010(13).
[3] *KRS* 281.010(14).

authorizing any *intracity* transportation of passengers in Louisville. Immediately after that annexation, the annexed Camp Taylor area became Louisville and, in terms, the certificate authorizing transportation "*from* Louisville *to* Camp Taylor" would not have authorized intracity transportation but only transportation from Louisville as it then existed to the portion of the Camp Taylor area which Louisville had not annexed.

To engage in *intra-Louisville* transportation in the annexed portion of Camp Taylor, Blue Motor would first have had to acquire a franchise from Louisville as required by *Ky. Const.*, §§s 163 and 164.

The 1950 Kentucky Motor Transportation Law and the provisions complained of made absolutely no change in this situation.

KRS 281.635 simply gave statutory recognition to the established constitutional right of cities under *Ky. Const.*, §§s 163 and 164, to require motor bus operators desiring to engage in intracity transportation first to obtain a franchise from the city. As previously pointed out, the Kentucky Court of Appeals in the *People's Transit* case,[4] *supra*, and a three-judge Federal Court sitting in Kentucky in the *Union Light, Heat & Power case*,[5] *supra*, had clearly stated the existence of this right long before the initial issuance to Blue Motor of its Camp Taylor certificate.

If *Ky. Const.*, §§s 163 and 164 are constitutional, then *KRS* 281.635 is constitutional because it in no wise

[4] *People's Transit Co.* v. *Louisville Railway Co.*, 220 Ky. 728, 295 S. W. 1055.

[5] *Union Light, Heat & Power Co.* v. *Railroad Commission*, 17 F. 2d 148.

broadens the rights conferred in 1891 by the Kentucky Constitution upon Kentucky cities.

KRS 281.665, the grandfathering provision, and *KRS* 281.010(13), the definition of certificate provision, simply assured to carriers operating at the time of the enactment of the 1950 Kentucky Motor Transportation Law that they would receive under new certificates broken down into three classifications, (a) City Bus Certificates, (b) Suburban Bus Certificates, and (c) Regular Route Common Carrier Bus Certificates, exactly the same rights which they previously had under their old general common carrier certificates. Certainly, no Federal constitutional question can arise from this grandfathering provision assuring to Blue Motor the same rights it had before the enactment of the 1950 Kentucky Motor Transportation Law.

On June 15, 1950, and for all previous years of its operation, Blue Motor's operation "from Louisville to Camp Taylor" had been exclusively of the type covered by the newly created "Suburban Bus Certificate." On June 15, 1950, the effective date of the 1950 Kentucky Motor Transportation Law, Blue Motor was entitled only to be grandfathered into a "Suburban Bus Certificate" permitting it to operate "from Louisville to Camp Taylor" over regular routes "but not granting authority to engage in intracity transportation." In fact, under *KRS* 281.615, which provided that "no person shall act as a motor carrier without first having obtained a certificate * * * from the department", Blue Motor was obligated to apply for a new Suburban

Bus Certificate before continuing its operations after June 15, 1950.

It is thus clear that had Blue Motor complied with the law and on June 15, 1950 applied for a new certificate covering its then and prior operations (*as Louisville Transit Co. actually did*), Blue Motor could only have been issued a Suburban Bus Certificate in lieu of its old common carrier certificate authorizing it to operate "from Louisville to Camp Taylor"; and that new Suburban Bus Certificate would have fully and completely conferred upon Blue Motor all rights it had ever had or claimed under its old common carrier certificate. Consequently, Blue Motor could then have been grandfathered into nothing except a "Suburban Bus Certificate."

Blue Motor's dereliction in failing to apply for a Suburban Bus Certificate until February 7, 1951, which was over 7 months after June 15, 1950, the effective date of the 1950 Kentucky Motor Transportation Law, and was over 6 months after June 30, 1950, the date on which Louisville annexed the Camp Taylor area, cannot broaden Blue Motor's grandfathering rights, which became effective on June 15, 1950, under the new Law.

It is true that on June 30, 1950, 15 days after the effective date of the 1950 Kentucky Motor Transportation Law, Louisville annexed substantially all of the Camp Taylor area. The fact that this annexation occurred 15 days after the effective grandfathering date of June 15, 1950, instead of 15 years thereafter, is of no moment in so far as the grandfathering provision of the 1950 Kentucky Motor Transportation Law is con-

cerned. Consequently, any subsequent attempt to broaden Blue Motor's old common carrier certificate or the new Suburban Bus Certificate into which that old common carrier certificate was entitled to be grandfathered on June 15, 1950 into a City Bus Certificate is without any basis whatsoever under the provisions of the 1950 Kentucky Motor Transportation Law.

This case must be decided just as if Blue Motor under the grandfathering provisions had applied for and had obtained a Suburban Bus Certificate on June 15, 1950, covering its operations "from Louisville to Camp Taylor" and had held and was operating under that Certificate on June 30, 1950, when Louisville annexed the Camp Taylor area.

Grandfathering has no bearing on the constitutional question.

SECOND POINT.

The Validity of the Annexation Statutes (*KRS* 81.100, *et seq.*), Under Which Louisville Annexed the Camp Taylor Area, Is Beyond Question.

The Annexation Statutes were enacted in 1893;[6] were in effect when Blue Motor's certificate to operate from Louisville to Camp Taylor was first issued; were in effect on June 30, 1950, when Louisville annexed the major portion of the Camp Taylor area; and are presently in effect in essentially the same form.

Consequently, there can be no question but that the Annexation Statutes under which Louisville was empowered to annex the Camp Taylor area became a

[6] *Acts* 1893, c. 244.

part of Blue Motor's common carrier certificate when initially issued and remained a part thereof on each annual renewal thereof as fully as if that certificate had specifically provided that it was issued subject to the right of annexation by Louisville and Louisville's then right to require Blue Motor to acquire a franchise from Louisville before conducting intracity transportation in Louisville.

In *Williams* v. *Nall,* 108 Ky. 21, 55 S. W. 706 (decided 1900), the Court of Appeals of Kentucky read an 1856 Act into a corporate charter and thereby applied the rule that statutes and constitutional provisions in effect at the time a contract is entered into became a part of the contract.

In *City of Henderson* v. *Henderson Traction Co.,* 200 Ky. 183, 254 S. W. 332 (decided 1923), the Kentucky Court of Appeals had said (254 S. W. 333):

> "But the parties are presumed to know the law and contract with reference thereto and that law becomes as much a part of the contract as if written in it."

As far back as 1873, in *Rees* v. *City of Watertown,* 19 Wall. 107, this Court said (19 Wall. 121):

> "All laws in existence when the contract is made are necessarily referred to in it and form a part of the measure of the obligation of the one party, and of the right acquired by the other."

Similarly, in *Armour Packing Co.* v. *United States,* 209 U. S. 56, this Court said (209 U. S. 82):

> "The statute being within the constitutional power of Congress, and being in force when the

contract was made, is read into the contract and becomes a part of it."

Certainly there can be no impairment of contract by a statute in existence at the time the contract was made and which therefore became a part of the contract. *KRS* 81.100, *et seq.*, specified by Blue Motor as impairing the obligation of its one year annually renewable common carrier certificates, were enacted in substantially their present form some 42 years before Blue Motor's certificate was first issued.

THIRD POINT.

The Validity of *Ky. Const.* §§s 3, 163 and 164 Is Beyond Question.

Ky. Const., § 3, which provides that "every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment", and *Ky. Const.*, § 163, which withholds from the legislature and confers upon cities the exclusive power to grant franchises for intracity operations, and *Ky. Const.*, § 164, which prescribes the method by which cities can create and grant franchises, were all adopted in 1891; were in effect at the time Blue Motor's common carrier certificate was initially issued; were in effect on June 30, 1950, when Louisville annexed the Camp Taylor area; and are presently in effect in verbatim language.

Prior to the issuance of Blue Motor's common carrier certificate in 1935, the Kentucky Court of

Appeals in the *People's Transit* case[7], *supra,* held that *Ky. Const.,* § 163 deprived the Kentucky legislature of any right to grant a privilege, certificate or franchise to a motor bus company to engage in intracity transportation of passengers in Louisville; conferred that right exclusively upon Louisville; and permitted Louisville Transit Co.'s principal predecessor, Louisville Railway Co., which then held, as Louisville Transit Co. now holds, a city-wide franchise from Louisville, to enjoin a competing motor bus operator from engaging in the intracity transportation of passengers in Louisville without a franchise from Louisville created and granted in accordance with the methods prescribed by *Ky. Const.,* § 164.

As in the case of *KRS* 81.100, the Annexation Statutes, *Ky. Const.,* §§s 3, 163 and 164 became a part of Blue Motor's common carrier certificate when issued and remained a part thereof upon each annual renewal thereof as fully as if that certificate had had written therein the express provision that it was issued and remained subject to the right of Louisville to annex the Camp Taylor area and the right of Louisville or its city-wide franchise holder to prevent Blue Motor from operating in any part of the Camp Taylor area which might be annexed by Louisville until it first obtained a franchise from Louisville.

The Kentucky constitutional provisions and the Kentucky Annexation Statutes cannot have impaired Blue Motor's one year annually renewable common

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[7]*People's Transit Co.* v. *Louisville Railway Co.,* 220 Ky. 728, 295 S. W. 1055.

carrier certificate, even if it should be given the dignity of a contract, because not one of those constitutional or statutory provisions were enacted after the initial issuance of Blue Motor's Camp Taylor certificate.

In *Fleming* v. *Fleming,* 264 U. S. 29 (decided 1924), this Court held that unless subsequent legislation was asserted to have impaired a contract, no substantial Federal question as to impairment of contract was raised.

In *Barrows* v. *Jackson,* 346 U. S. 249, this Court said (346 U. S. 260):

> "It is contended by petitions that for California courts to refuse to enforce this covenant is to impair the obligation of their contracts. Article I, § 10, of the Federal Constitution provides: 'No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *.' The short answer to this contention is that this provision, as its terms indicate, is directed against legislative action only.
>
> " 'It has been settled by a long line of decisions, that the provision of § 10, Article I, of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts * * *.' "

The decisions by the Kentucky Court of Appeals in this *Blue Motor* case[8] is no new decision, but is simply a reaffirmation of the law Kentucky has previously settled in the *People's Transit* case,[9] *supra,* and in the

[8] *Whitaker, et al.* v. *Louisville Transit Co.,* 274 S. W. 2d 391.
[9] *People's Transit Co.* v. *Louisville Railway Co.,* 220 Ky. 728, 295 S. W. 1055.

Union Light, Heat & Power case,[1] *supra,* and even if there could be impairment by judgment as well as by legislation, the judgments of the Kentucky Court of Appeals in the *People's Transit* case and of the three-judge Federal Court sitting in Kentucky in the *Union Light, Heat & Power* case were both rendered long before the initial issuance of Blue Motor's Camp Taylor certificate and the present *Blue Motor* decision is simply a recognition and reaffirmation of the law as established in those cases.

Similarly in *United States Fidelity & Guaranty Company* v. *Oklahoma,* 250 U. S. 111 (decided 1919), this Court held that for subsequent state legislation to be held invalid it must appear that the *subsequent* legislation complained of as impairing the contract, rather than earlier laws, furnished the ground of decision in the state courts.

The only subsequent legislation which Blue Motor refers to are the designated sections of the 1950 Kentucky Motor Transportation Law with which we have previously dealt. As hereinbefore shown, none of those sections affected, in the slightest degree, any right which Blue Motor then had under its certificate.

Just as there is no impairment of contract by statutory and constitutional provisions in effect at the time of the initial issuance of Blue Motor's Camp Taylor certificate, similarly there can be no deprivation of any property of Blue Motor without due process by virtue of those constitutional and statutory provisions

[1] *Union Light, Heat & Power Co.* v. *Railroad Commission,* 17 F. 2d 148.

which became a part of the very one year annually renewable common carrier certificate authorizing Blue Motor to transport passengers "from Louisville to Camp Taylor" which it now asserts constitutes some form of property.

It is again to be noted that the annexed Camp Taylor area upon annexation became Louisville and thereafter the Camp Taylor certificate in terms only authorized the transportation of passengers from Louisville to the then remaining unincorporated portions of the Camp Taylor area.

FOURTH POINT.

Blue Motor's Argument that the Decision in This Blue Motor Case Will Obstruct the Development Nationally of Public Utility Services Is Completely Irrevelant.

Blue Motor argues at length that the decision in this Blue Motor case will seriously impair the provision of public utility services for suburbs bordering American cities; will make regulatory agencies powerless to provide guaranties necessary to attract such service; and will, therefore, obstruct the development of such public utility service nationally.

The short and simple answer to that argument is that the provisions of the Kentucky Constitution and statutes apply only to Kentucky and that notwithstanding those provisions which have been in effect since 1891 and 1893, respectively, Kentucky has suffered from no lack of provision of utility service.

Kentucky's method of dealing with urban transportation in annexed areas is that such transportation must be under franchise granted by the annexing city. That may not be the only method, or even the best method, of handling the situation, but it is Kentucky's method unequivocally set forth in *Ky. Const.* §§s 163 and 164.

Furthermore, it is a solution for the situation that Kentucky was perfectly free to adopt. Blue Motor was fully aware of Kentucky's method of dealing with the situation when it applied for and received its first certificate, and cannot now successfully attack that method under the Federal Constitution.

FIFTH POINT.

The Cases Cited by Blue Motor Are Not in Point.

Blue Motor has cited a hodge-podge of cases which either involve (1) statutes enacted subsequent to the execution of the contract impaired or the acquisition of the property in question, or (2) constitutional and statutory provisions wholly different from those of Kentucky which it attacks.

Detroit United Railways v. *Michigan*, 242 U. S. 238, dealt with a situation wherein Detroit United Railways (which was organized under an act permitting it to acquire the roads and franchises of other street railways and enjoy them upon the same terms as the other street railways had enjoyed them) acquired a street railway operating under a franchise from Detroit and street railways operating under franchises from outlying villages. The fares specified in the outlying vil-

lages' franchise ordinances were higher than was the fare specified in an 1889 supplement to the Detroit franchise ordinance.

In 1905 and 1907, the Michigan legislature by special acts annexed portions of the villages into Detroit and provided that the annexed territories should be subject to all ordinances of the city.

It was contended that this required Detroit United Railways to operate in the portions of the villages which had been annexed at the lower fare specified in the Detroit franchise ordinance, instead of at the higher fare specified in the villages' franchise ordinances.

The Supreme Court, of course, held that this subsequent legislation could not substitute the Detroit fare for the villages' fares.

The other Supreme Court cases cited by Blue Motor are similarly without bearing upon the issues in this case.

Blue Motor similarly *erroneously cites Town of Fultondale* v. *Clelland Bus Lines,* 254 Ala. 225, 48 So. 2d 21, as deciding in favor of Blue Motor "the precise question involved in the case at bar."[2]

That case decides no such thing.

There, Clelland Bus Lines acquired bus operating certificates over certain state highways, not specifying the size of the busses. Thereafter, Fultondale was incorporated, including portions of those highways, and undertook to prohibit the operation of taxicabs over its streets, except under permit from the town council,

[2]Blue Motor Jurisdictional Statement, p. 14.

and defined taxicab as a "public service automobile designed to seat 7 passengers or less."

Clelland Bus Lines endeavored to operate two 5-passenger automobiles in Fultondale under its state certificate without securing the required municipal permit.

The trial court enjoined it from engaging in intracity transportation with those 5-passenger cars without obtaining a permit from Fultondale, but refused to enjoin it from using those two 5-passenger cars for the transportation of passengers between Fultondale and points outside of Fultondale, nothwithstanding the fact that the *Alabama Constitution* § 202 provided that no person should use the streets of any town without first obtaining the consent of the town.

Clelland Bus Lines did not appeal from the trial court's decision as to intracity operations. Upon appeal by the city, the appellate court affirmed the trial court's decision as to the remainder of the operation.

This Alabama case does involve a constitutional provision (*Ala. Const.*, § 220) which is somewhat similar to *Ky. Const.* §§s 163 and 164. The difference, however, is that the Kentucky Court of Appeals has held that *Ky. Const.*, §§s 163 and 164 are (1) "self-operative" (*Irvine Toll Bridge Co.* v. *Estill County*, 210 Ky. 170, 174, 275 S. W. 634, 636); and (2) "withheld the right of the Legislature to grant the franchise for purely intraurban operations, and conferred that right exclusively upon the city authorities" (*People's Transit Co.* v. *Louisville Railway Co.*, 220 Ky. 728, 736, 295 S. W. 1055, 1058); whereas the Alabama Supreme

Court has held (1) that *Ala. Const.*, § 220, "was not intended to divest the state of its sovereign power and invest it in cities" (*Ex Parte Ashworth*, 86 So. 84, 85; *City of Mobile* v. *Farrell, et al.*, 158 So. 539, 540-541); and (2) has said: "The cities derived their authority to grant franchises from the legislature" (*Phenix City* v. *Alabama Power Co.*, 195 So. 894, 899).

It is thus seen that this Alabama case is no authority contrary to the well-established Kentucky rule. Even if the Alabama law was contrary to the Kentucky law, that would create no Federal constitutional question.

Blue Motor makes the utterly amazing statement[3] that "no case has been found where the utility serving a suburb was ousted because of territorial annexation."

Louisville Transit Co. happened to cite several such cases in its briefs before the Kentucky Court of Appeals, namely: *Evergreen Trailways, Inc.* v. *City of Renton*, 38 Wash. 2d 82, 228 P. 2d 119 (1951), and *Arkansas Power & Light Co.* v. *West Memphis Power & Water Co.*, 187 Ark. 41, 58 S. W. 2d 206 (1933). See also *San Francisco-Oakland Terminal Railways* v. *Alameda County, et al.*, 66 Calif. App. 77, 225 P. 304 (1924), and *City of Wichita Falls* v. *Bowen*, 143 Tex. 45, 182 S. W. 2d 695 (1944).

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[3]Blue Motor Jurisdictional Statement, p. 14.

CONCLUSION.

When Blue Motor obtained its first one year annually renewable certificate, it took that certificate subject to the known possibilities (1) that Louisville might annex the adjacent Camp Taylor area; (2) that if it did so, Blue Motor could not continue to operate intracity in that area without obtaining a franchise from Louisville; (3) that the city-wide carrier holding a city-wide franchise could extend its service into the annexed Camp Taylor area; and (4) that either Louisville or its city-wide carrier, Louisville Transit Co., could enjoin Blue Motor from continuing its operating intracity in Camp Taylor as they have done.

Those provisions and conditions of the Kentucky law *ipso facto* became a part of the Blue Motor certificate upon its original issuance.

Consequently, this appeal does not present a substantial Federal question and should be dismissed.

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June 1, 1955.

No. 62

FILED
JUN 21 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

RAY WHITAKER and HARRY L. SWAIM, doing business as Blue Motor Coach Lines, *Appellants,*

v.

LOUISVILLE TRANSIT COMPANY, the CITY OF LOUISVILLE, and the DEPARTMENT OF MOTOR TRANSPORTATION, COMMONWEALTH OF KENTUCKY, *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

REPLY TO MOTION TO DISMISS

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INDEX

	Page
1. Louisville Transit's Basic Argument: Prior Notice	2
2. A Rational Utility Policy for Annexed Suburbs	8
3. The Facts and Certain Precedents	11
Conclusion	14

CITATIONS

Cases:

Arkansas Power & Light Co. v. West Memphis Power & Water Co., 187 Ark. 41, 58 S.W. (2d) 206 (1933)	14
Chicago M. & St. P. R. Co. v. Wisconsin, 238 U.S. 491 (1915)	3
City of Bowling Green v. Davis, 313 Ky. 203, 230 S.W. (2d) 909 (1950)	10
City of Prichard v. Alabama Power Co., 234 Ala. 339, 175 So. 294 (1937)	4
City of Wichita Falls v. Bowen, 143 Tex. 45, 182 S.W. (2d) 695 (1944)	13
Coombes v. Getz, 285 U.S. 434 (1932)	3
Dahnke-Walker Milling Co. v. Boudurant, 257 U.S. 282 (1921)	7
Detroit United Railway v. Michigan, 242 U.S. 238 (1916)	8
Evergreen Trailways v. City of Renton, 38 Wash. (2d) 82, 228 P. (2d) 119 (1951)	13
Frost v. Corporation Commission, 278 U.S. 515 (1929)	8
Georgia Railway & Power Co. v. College Park, 262 U.S. 441 (1923)	8
Georgia Railway & Power Co. v. Decatur, 262 U.S. 432 (1923)	8

Page

King Manufacturing Co. v. Augusta, 277 U.S. 100 (1928) 7
Los Angeles v. Los Angeles Gas & E. Co., 251 U.S. 32, 39-40 (1919) 8
People's Transit Co. v. Louisville Railway Co., 220 Ky. 728, 295 S.W. 1055 (1927) 6
Reo Bus Lines v. Southern Bus Lines, 209 Ky. 40, 272 S.W. 18 (1925) 9
San Francisco-Oakland Terminal Rys. v. Alameda County, 66 Cal. App. 77, 225 Pac. 304 (1924) 13
Superior Water, Light & Power Co. v. Superior, 263 U.S. 125 (1923) 3
Town of Fultonsdale v. Clelland Bus Lines, 254 Ala. 225, 48 So. (2d) 21 (1950) 4, 10
Truesdale v. City of Newport, 28 K.L.R. 840, 90 S.W. 589 (1906) 9

Constitutions and Statutes:

Alabama Constitution (1901) § 220 10

Kentucky Constitution (1891):
Section 3 3
Section 163 ..... 3, 4, 10
Section 164 ..... 3, 4, 6

Carroll's Kentucky Statutes (1935):
Sections 2761-64, 3050-54, 3287, 3483, 3611-14, 3664-67 5
Sections 3713-16 5

Kentucky Revised Statutes (1954):
Sections 81.100-81.270 ..... 3, 5
Sections 281.010(14), (15) 6
Section 281.650(5) 13
Section 281.665 6

United States Code:
Title 28, sections 1257(2), 1257(3), 2103... 7

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ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

REPLY TO MOTION TO DISMISS

Of the three appellees, only Louisville Transit Co. has filed a motion in opposition to the Jurisdictional Statement. In the proceedings and appeals below, where the issues were broader,[1] the City of Louisville

[1] In all the proceedings below, the principal issue was Louisville Transit's right to operate over the route in question. By way of counterclaim, Louisville Transit attacked appellants' operating privileges. It is only the adverse decision on the "counterclaim" which is being appealed here (Jurisdictional Statement, pp. 6-7).

generally aligned itself with Louisville Transit, but here the City has not offered any objection to plenary consideration of the constitutional issues involved. Appellee Department of Motor Transportation, Commonwealth of Kentucky, which, as an administrative agency, upheld the position taken by appellants in this Court, and which, through the Attorney General of the Commonwealth, supported this view through the state courts, has likewise raised no objection in this Court to acceptance of jurisdiction. Both the City and the Commonwealth Department supported appellants' motion for a stay submitted to Mr. Justice Reed.

Louisville Transit's brief, appended to its motion to dismiss, undertakes to restate the facts, and to present arguments on procedural and substantive grounds. Appellants here submit their reply, in which they deal with the principal points made by Louisville Transit, to the extent not already covered by the Jurisdictional Statement.

1. LOUISVILLE TRANSIT'S BASIC ARGUMENT: PRIOR NOTICE

The main burden of Louisville Transit's argument, both as to substance and as to appellate procedure, is that some of the Kentucky constitutional and statutory provisions cited in the Notice of Appeal were in effect when appellants obtained their first certificate of convenience and necessity in 1935, and therefore cannot be considered either to have impaired vested rights, or to constitute such state statutory action as to provide the basis for review on appeal. On the substantive side, "prior notice" was also the central point of the opinion below.

The argument is specious. Nothing in the Kentucky statutory scheme of 1935 gave the slightest hint of what the legislative changes of 1950-51 were to be construed to mean in 1955 by a divided Kentucky court.

Of what can appellants be said to have been forewarned in 1935? Of the provisions relied upon by the court below, and which, as so construed, are here challenged on appeal, Ky. Const. §§ 3, 163 and 164, and KRS (1954) §§ 81.100, et seq., were in effect in the same or substantially the same form in 1935 as they are today.

Section 3 of the Kentucky Constitution simply provides that privileges granted are not to be exclusive, and are subject to revocation, alteration or amendment. Appellants ask here for no exclusive privilege; it is Louisville Transit, not content with having intruded on appellants' long-established service, which seeks monopoly. Decisions of this Court rendered long before 1935 have established that a reserved power to alter, amend or repeal cannot be used to impair vested rights. *Chicago M. & St. P. R. Co.* v. *Wisconsin*, 238 U.S. 491 (1915); *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125 (1923); see also *Coombes* v. *Getz*, 285 U.S. 434 (1932).

Sections 163 and 164 of the Kentucky Constitution provide, as they did in 1935:

> Sec. 163. No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the con-

sent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has, in good faith, been begun thereunder, the provisions of this section shall not apply.

Sec. 164. No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

These provisions simply served notice that if the Camp Taylor area (then unincorporated territory) were ever to be incorporated into a municipality, that municipality would have certain "home rule" powers. Appellants do not dispute the assignment of regulatory jurisdiction by Kentucky between state-wide and municipal agencies. But such an assignment of jurisdiction neither gives any hint nor expresses any intent that it is to be accompanied by a destruction of one man's operating privileges in favor of another. If anything, the proviso at the end of section 163 might be taken to have given reassurance to reasonable men of a purpose to protect, not to destroy, vested rights. Alabama has read just such a constitutional provision to protect a bus company's vested certificate rights against impairment by a municipality which later acquired governmental jurisdiction over the area. *Town of Fultonsdale* v. *Clelland Bus Lines*, 254 Ala. 225, 48 So. (2d) 21 (1950). See also *City of Prichard*

v. *Alabama Power Co.,* 234 Ala. 339, 175 So. 294 (1937).

The Kentucky statutes in effect in 1935 made elaborate provision for the annexation of territory by cities of each of the six classes of municipalities. The larger cities could annex smaller ones, as well as unincorporated territory. Carroll's Ky. Stat. (1935) §§ 2761-64, 3050-54, 3287, 3483, 3611-14, 3664-67. These provisions are in effect today without significant change. KRS (1954) §§ 81.100-81.270. Did these provisions serve fair warning on appellants that (a) the territory served by their route would some day be annexed, (b) that such annexation would be by Louisville and not by another city, (c) that Louisville would in the interim (1942) have granted a "city-wide" 20-year franchise to Louisville Transit without making explicit provision therein for the event of annexation, and (d) that the Court of Appeals would reach the conclusion that such an annexation divests the appellants of actively-used operating rights in favor of the later Louisville Transit franchise, interpreted to expand with the city boundaries? The court below said, without a scintilla of evidence in the record to support the assertion, " . . . even at that time [1935] there was a reasonable probability that the city would sometime in the future annex the Camp Taylor area." The statutes warned that annexation might occur, but only in the sense that every acre of Kentucky might be annexed at some vague future time to some municipality. It was equally probable that Camp Taylor might form a new and separate municipality under Carroll's Ky. Stat. (1935) §§ 3713-16. It has been known for 100 years that Texas is free to divide itself into several states. It does not follow that every Texas

utility is now on notice that in such event it can be summarily ousted of its franchises.

Louisville Transit sought to buttress its argument on "prior notice" by citing *People's Transit Co.* v. *Louisville Railway Co.*, 220 Ky. 728, 295 S.W. 1055 (1927), no less than eight times (Brief, pp. 2, 6-7, 9, 15, 21, 22-23, 27). In that case, a corporate predecessor of Louisville Transit sought legal relief against the competition of a rival passenger bus operator. But at that point the similarity with the case at bar ends. No state certificate, no annexation of territory, no long established service were involved. The case simply held that the city might not authorize bus service by ordinance; it must take competitive bids under Ky. Const. § 164, quoted supra at p. 4. The case is quite irrelevant to the issues here presented.

These were the provisions of Kentucky law in effect in 1935. It is submitted that (a) as a matter of substantive law, they cannot be said to have subordinated appellants' contractual or property rights to a future franchise, granted in 1942, expressly non-exclusive, and expanded by later court decision to follow the expanding boundaries of Louisville, and (b) as a matter of appellate procedure, they cannot be considered to be, by themselves, the operative Kentucky statutes which deprived appellants of their rights.

If we look at the events of 1950-51, we get quite another picture. The 1950 general revision of the motor carrier statute created for the first time the classification of some motor bus certificates as "city" and "suburban." KRS (1954) §§ 281.010 (14), (15). This new classification introduced such a discontinuity into the form of bus certificates as to require an explicit new "grandfather clause." KRS (1954) § 281.665.

The text of the new clause was sufficiently ambiguous to open the way to the casuistic reasoning which Louisville Transit has pursued throughout this case: that because Camp Taylor was not a city on June 14, 1950, appellants could not have secured a "city bus certificate" under the grandfather clause on June 15, 1950, when the new motor carrier statute became effective; that because appellants held no "city bus certificate" on July 1, 1950, when Camp Taylor became part of a city, they could have no "grandfather" rights to their old route because only a "city" certificate carried "grandfather" rights in a city.

The motor carrier statute of 1950, the Louisville annexation of Camp Taylor in 1950, the city's purported authorization to Louisville Transit in 1951 to extend its route into Camp Taylor,[2] and the refusal of Louisville in 1951 to entertain appellants' application for a franchise (R. 74-75, 198-99, 252-53, 264, 271, 292-311) were the operative acts which precipitated the decision below. Each of these acts is deemed a state statute, which, as applied to appellants, may be challenged on appeal under 28 U.S.C. § 1257(2). *King Manufacturing Co.* v. *Augusta,* 277 U.S. 100 (1928); *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921). Of course, the decision below is also reviewable on certiorari under 28 U.S.C. §§ 1257(3), 2103.

Apart from the argument that the appellants were "on notice" in 1935, Louisville Transit offers no

[2] Louisville Transit wrote a letter to a city official announcing its intention of extending its service into the Camp Taylor area. Two officials signed in the corner under the word "approved" (R. 466). No further consideration of the problem is shown by the record.

serious challenge to the showing of impairment of constitutional rights. *Detroit United Railway* v. *Michigan*, 242 U.S. 238 (1916), after a page of explanation (Louisville Transit Brief, pp. 25-26) is still, obviously, directly in point, and decisive as a precedent. *Frost* v. *Corporation Commission*, 278 U.S. 515 (1929), equally decisive, is not even mentioned. It has been similarly held that municipal annexation cannot constitutionally impose new burdens on a utility in the annexed territory. *Georgia Railway & Power Co.* v. *Decatur*, 262 U.S. 432 (1923); *Georgia Railway & Power Co.* v. *College Park*, 262 U.S. 441 (1923). These cases clearly and definitively establish that the construction of the court below impairs the obligation of appellants' contract and deprives them of their property without due process of law.

As this Court said in *Los Angeles* v. *Los Angeles Gas & E. Co.*, 251 U.S. 32, 39-40 (1919):

> "A franchise conveys rights, and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they would be infirm indeed in tenure and substance. . . . It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another. And this the 14th Amendment forbids."

2. A RATIONAL UTILITY POLICY FOR ANNEXED SUBURBS

The court below created a dilemma for itself, and then resolved it in blunderbuss fashion. The argument of each of the opposing parties was characterized as "a sound and logical principle of law considered

in the abstract." The court conceded, albeit grudgingly, that appellants' certificate ". . . has some of the attributes of a property right . . ."[3] But since it construed Louisville Transit's franchise to expand with the city's boundaries,[4] and since each party in the state court sought the exclusion of the other,[5] the Court of Appeals reasoned that it must choose the "superior right." In doing so, it is submitted, guaranties under the Federal Constitution were violated.

The state administrative agency had pointed the way to a rational and practical solution of the problem without the creation of an unnecessary dilemma. It ruled that both carriers might serve the route in competition. This situation has prevailed from early 1951 to date. Since Louisville Transit's only claim to operating rights, its franchise, is expressly non-exclusive, it could have no plausible objection.

Appellants have sought from the earliest stages of this case to accept city regulatory jurisdiction, to secure a city franchise, and to pay reasonable compensation for such a franchise. They applied promptly for a franchise, and pressed their application repeatedly, but the city has taken no action, apparently consider-

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[3] The same court has held long before that such a certificate was quite definitely a property right. *Reo Bus Lines* v. *Southern Bus Lines*, 209 Ky. 40, 272 S.W. 18 (1925).

[4] *Truesdale* v. *City of Newport*, 28 K.L.R. 840, 90 S.W. 589 (1906), held that a utility's franchise automatically extended to annexed territory. However, no competing operating rights were there involved; no other service was offered in the annexed territory.

[5] In this Court, appellants only claim constitutional protection for non-exclusive operating rights; they do not here challenge so much of the decision below as permits Louisville Transit to operate.

ing that its non-exclusive franchise to Louisville Transit excluded any franchise to a competitor.[6]

Faced with a similar problem, the highest court of Alabama came to the opposite conclusion from that of the majority of the Kentucky court:

> "Here, the provisions of § 220 of the Constitution were not applicable to the parts of the roads in question at the time the respondent bus company secured its certificate of public convenience and necessity, for the reason that the town of Fultondale was not then in existence. Respondent's right to operate over said roads was not superseded by the subsequent incorporation of the complainant town. City of Pritchard v. Alabama Power Co., 234 Ala. 339, 175 So. 294." *Town of Fultonsdale* v. *Clelland Bus Lines,* 254 Ala. 225, 227-28, 48 So. (2d) 21, 22 (1950).

Section 220 of the Alabama Constitution[7] is very similar to Section 163 of the Kentucky Constitution, quoted supra at pp. 3-4. As recently as 1950, the Kentucky Court of Appeals turned to Alabama precedents in another case, because the Kentucky Constitution was so largely followed in the drafting of the Alabama Constitution. *City of Bowling Green* v. *Davis,* 313 Ky. 203, 209-10, 230 S.W. (2d) 909, 912-13 (1950).

What is involved here is much more than a just resolution of a dispute between competitors. What is at stake is a rational legal structure to permit our suburbs to secure utility and transportation services. The decision below serves notice on any utility undertaking to serve a suburb that its operating privileges can be wiped out by any future annexation of the territory to the adjoining city. No avenue of security was

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[6] R. 74-75, 198-99, 252-53, 264, 271, 292-311.

[7] Text given in the Jurisdictional Statement, p. 14, n. 10.

left open for such a prospective utility. A state agency's grant would terminate if the area were annexed to a city; the city could hardly grant a franchise when the area is not, and may never be, part of the city.

These considerations of far-reaching public significance Louisville Transit characterizes as "irrelevant," and it offers only the laconic observations that (1) Kentucky has not suffered from lack of utility services, and (2) Kentucky is free to allocate jurisdiction between state and municipal officials as it pleases.

These observations are beside the point. (1) Of course, Kentucky has not yet suffered from the decision below; it was rendered only a few months ago, and is now here on appeal. (2) Kentucky's allocation of governmental responsibility is not in issue here; what is in issue is the destruction of vested rights which the court below considers a necessary consequence of a transfer of jurisdiction.

The consequences envisaged for the doctrine declared below have not been seriously disputed because they cannot be gainsaid. That decision inevitably means that the Surburban Gas Company will have to dig out its pipes and make way for the pipes of the City-Wide Gas Company when the City annexes the Suburb. With thousands of municipal annexations taking place throughout the country annually (Jurisdictional Statement, p. 13), the national importance of the question here at issue can hardly be overestimated.

3. THE FACTS AND CERTAIN PRECEDENTS

By constant repetition of the statement that appellants' operating certificate, from the beginning, excluded the carriage of Louisville intracity passengers (Louisville Transit's Brief, pp. 1-2, 3, 6, 9, 14-15, 16),

Louisville Transit's Brief may tend to give the impression that appellants are here seeking an expansion of their operating authority.[8] Appellants ask only to be permitted to continue to offer the exact service which they have now provided for 20 years, no more and no less. They have never offered passage wholly within the old (pre-1950) Louisville boundaries, and they make no claim here to be permitted to do so. They have always offered passage between downtown Louisville and the Camp Taylor area annexed to the City in 1950; they ask only the privilege of continuing to do so. Appellants seek no expanded authority. It is only the enlargement of the City boundaries which has made most of appellants' route an intracity one. Appellants contend that such a boundary change cannot constitutionally deprive them of vested operating rights.

Again by constant repetition, Louisville Transit's brief seeks to minimize the status of appellants' operating certificate by referring to it as an "annually renewable certificate" (pp. 1, 3, 9, 19, 20, 21-22, 24, 29). All certificates issued by the Kentucky Department of Motor Transportation have been renewable annually, but such renewal is a matter of right, as fully explained in the Jurisdictional Statement (pp.

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[8] In fact, the certificates held by appellants from 1935 to the institution of this case never contained language excluding intracity carriage, R. 447. Note the loose use of quotation marks by Louisville Transit:

> . . . Blue Motor was entitled only to be grandfathered into a "Suburban Bus Certificate" permitting it to operate "from Louisville to Camp Taylor" over regular routes "but not granting authority to engage in intracity transportation." (Brief, p. 16.)

The phrase first quoted is from the statute, the second quotation from appellants' certificate, and the third from the statutory definition of the first.

18-19). Annual renewal serves as a convenient way for the Department to collect the prescribed small annual fee required by statute. KRS (1954) § 281.650 (5).

References in Louisville Transit's brief to the quality of appellants' service,[9] and the suggestion of some "dereliction" on appellants' part in failing to make timely application for the new form of certificate after the 1950 statute became effective[10] are quite out of place. None of the decisions below gave any consideration to these arguments. Certainly they are irrelevant here on appeal on constitutional issues.

No precedents for the ouster of an established public utility upon annexation of its territory, under circumstances analogous to the case at bar, have been cited. *San Francisco-Oakland Terminal Rys.* v. *Alameda County,* 66 Cal. App. 77, 225 Pac. 304 (1924), cited by Louisville Transit, was a dispute between county and city over the franchise revenues; neither side disputed the validity of the franchise. *City of Wichita Falls* v. *Bowen,* 143 Tex. 45, 182 S.W. (2d) 695 (1944), cited here by both sides, involved the rate of fare; neither party contested the established utility's right to operate. In *Evergreen Trailways* v. *City of Renton,* 38 Wash. (2d) 82, 228 P. (2d) 119 (1951), the established utility was given the opportunity to bid

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[9] Louisville Transit offered some witnesses who complained of appellants' service (R. 413-43). Appellants challenged the relevance of such evidence in this case, and offered none in rebuttal (R. 325-26, 413-19). In fact, appellants estimate that in open competition during the pendency of this case they have been carrying about 2/3 of the traffic on this route, despite a higher fare.

[10] The new state agency created by the 1950 statute took a while to prepare the new forms, procedures, etc. (R. 331-34).

for a city franchise, but was outbid by another. In *Arkansas Power & Light Co.* v. *West Memphis Power & Water Co.*, 187 Ark. 41, 58 S.W. (2d) 206 (1933), the older utility apparently sought not to preserve an area-wide service, but to use its transmission line along a state highway as a touchstone for elaborating a city-wide service.

CONCLUSION

It is submitted that the appeal is well taken, that appellants have been deprived of constitutional rights by the decision below, that the questions presented are of fundamental significance in the adjustment of basic public utility services required by the most fundamental population trend of this generation, and that the issues merit plenary consideration by this Court for their resolution.

Respectfully submitted,

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No. 62. WHITAKER ET AL., DOING BUSINESS AS BLUE MOTOR COACH LINES, *v.* LOUISVILLE TRANSIT CO. ET AL. Appeal from the Court of Appeals of Kentucky. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Jack Garrett Scott, George Bronz* and *Reuben S. Haslam* for appellants. *John E. Tarrant* and *Earl S. Wilson* for the Louisville Transit Co., appellee. Reported below: 274 S. W. 2d 391.